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In the Supreme Court of the United States

OCTOBER TERM 1955

No. 257

SOUTHERN PACIFIC COMPANY,
a Corporation,
Petitioner,

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZIA and CHARLES EELK

Petition for Writ of Certiorari to the Supreme Court of the State of California to Review Five Cases Involving Identical or Closely Related Questions

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In the Supreme Court of the United States

OCTOBER TERM 1955

No. .....

SOUTHERN PACIFIC COMPANY, a Corporation, *Petitioner,*

v.

CHARLES M. GILEO, EPIMENIO MORENO, ROQUE ARANDA, ALBERT EUFRAZEA and CHARLES EELK

Petition for Writ of Certiorari to the Supreme Court of the State of California

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable the Associate Justices of the Supreme Court of the United States:

On April 29, 1955, the Supreme Court of California decided 5 cases, then pending in that court, entitled and numbered as follows:

Charles M. Gileo, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, SF.No. 19090;

Epimenio Moreno, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6520;

Roque Aranda, Plaintiff and Respondent, v. Southern Pacific Company, a corporation, Defendant and Appellant, Sac. No. 6521;

Albert Eufrazia, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6522; and

Charles Eelk, Plaintiff and Appellant, v. Southern Pacific Company, a corporation, Defendant and Respondent, Sac. No. 6523.

These cases all involved "identical or closely related questions" (Rules U.S. Sup. Ct., Rule 23 subd. 5). In each a plaintiff-employee sued Southern Pacific Company, his employer, to recover damages for personal injuries received by him in the course of his employment. In each the plaintiff charged the defendant, as his employer, with negligence and based his action on the Federal Employers' Liability Act (45 USC § 51 ff). In each the defendant-employer asserted that the Federal Employers' Liability Act had no application because the activity in which the employer and employee were engaged was not common carriage by railroad but was manufacturing (*Gileo, Eufrazia* and *Eelk*, assembly line new car construction; *Aranda*, wheel making in a wheel foundry) or new construction (*Moreno*, construction of a new "retarder yard"). In each case the Supreme Court of California held that the Federal Employers' Liability Act applied and held against the position of Southern Pacific Company, the employer-defendant. Deeming itself aggrieved Southern Pacific Company, the defendant-employer, agreeably to subdivision 5 of Rule 23 of the Rules of the Court seeks review of the judgments of the

Supreme Court of California on writ of certiorari by filing this single petition for writ of certiorari covering all the cases.*

OPINIONS BELOW

Gilco v. Southern Pacific Company. The trial court rendered no opinion. The opinion of the District Court of Appeal of the State of California, First Appellate District, Division Two (R337-343; App. 5-12) is reported in 124 A.C.A.[1] 951 and 269 P2d 150. The opinion of the Supreme Court of California (R325-330; App. 13-17) is reported in 44 A.C.[2] 565 and 282 P2d 872. The opinions are appended as indicated.

Moreno v. Southern Pacific Company. The opinion of the trial court (R360, 361; App. 20, 21), filed on the granting of defendant's motion for judgment *n.o.v.* is not reported.[3] The appeal from the judgment was to the District Court

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*A single consolidated record, made up of copies of the typewritten records used below, is filed herewith.

Below each case had its own record separately paged and each of these records was made up of at least two sections (a Clerk's Transcript and a Reporter's Transcript), or more sections, each separately paged. Here, for convenience, the whole of the consolidated record has been paged consecutively throughout at the lower outer corner of the pages and all references herein to the record (R) are to this paging.

1. Advance California Appellate Reports, the advance sheets of the opinions of the District Courts of Appeal of the State of California. The Supreme Court of California having granted a hearing and transferred this case to the Supreme Court for decision the opinion of the District Court of Appeal will not be officially reported.

2. Advance California Reports, the advance sheets on the opinions of the Supreme Court of California. The opinion will be officially reported in 44 California Reports, 2d Series.

3. The court directed that judgment in favor of the defendant be entered upon the ground that there was no evidence of negligence on the part of the defendant. The opinion does not deal with the questions presented by this petition.

of Appeal of the State of California, Third Appellate District. By order of the Supreme Court of California the case was transferred to the Supreme Court of California before decision by the District Court of Appeal and, by consequence, there is no opinion of the District Court of Appeal (R627, 628). The opinion of the Supreme Court of California (R617-620; App. 23-25) is reported in 44 A.C. 572 and 282 P2d 877. The opinions are appended as indicated.

Aranda v. Southern Pacific Company. The opinion of the trial court (R1130-1134; App. 28-33), is not reported. The appellate procedure was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1138) The opinion of the Supreme Court of California (R1122-1127; App. 35-38) is reported in 44 AC 569 and 282 P2d 875. The opinions are appended as indicated.

Eufrazia v. Southern Pacific Company. The opinion of the trial court (R1158-1170; App. 40-50) is not reported. The procedure on appeal was the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1351) The opinion of the Supreme Court of California (R1347, 1348; App. 54, 55) is reported in 44 AC 575, and 282 P2d 879. The opinions are appended as indicated.

Eelk v. Southern Pacific Company. The opinion of the trial court (R1366-1380; App. 57-70) is not reported. The proceedings on appeal were the same as in *Moreno* and there is no opinion of the District Court of Appeal. (R1525) The opinion of the Supreme Court of California (R1522-1522a; App. 74, 75) is reported in 44 AC 576 and 282 P2d 880. The opinions are appended as indicated.

JURISDICTION

The judgments of the Supreme Court of California sought to be reviewed, there being a separate judgment in each

case, were rendered and entered on April 29, 1955. (R325, 331, 617, 621, 1122, 1128, 1347, 1349, 1522, 1523) There was no order in any of the cases respecting a rehearing or granting an extension of time within which to petition for certiorari. The judgments have become final (California Rules on Appeal, Rule 24) so far as the court below is concerned and remittitures issued (California Rules on Appeal Rule 25) on May 31, 1955 (R331, 621, 1128, 1349, 1523). The statutory provision believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari is 28 USC § 1257(3) if the petition is presented within the time specified in the Rules of this Court, Rule 22 subd. 3, and 28 USC § 2101(c).

QUESTIONS PRESENTED FOR REVIEW

When an employer, which, as to some of its activities, is a common carrier by railroad engaged in interstate commerce, is manufacturing new equipment (freight cars and car wheels) or constructing new facilities (a "retarder yard") which will be, but have not yet been, placed in railroad service, and an employee, employed by it in such manufacturing or new construction, is injured in the course of his employment as the result of negligence of the employer can the employee maintain an action for damages under the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 65, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 51)?

More precisely, has the 1939 amendment of § 1 of the Federal Employers' Liability Act, which amended that section by adding the second paragraph, obliterated the theretofore established distinction between maintenance and repair which fell within the Act, and manufacturing and new construction to which the Act did not apply?

Has this amendment of 1939 made the sole test of applicability of the Act that of the second paragraph of § 1 added in 1939 so that the Act is applicable whenever any part of the duties of the employee is "the furtherance of interstate or foreign commerce: or shall, in any way directly or closely and substantially, affect such commerce" and has it eliminated the theretofore established **second** test under the **first** and unchanged paragraph (reenacted in 1939 without change) that for the Act to apply the **employer**, with respect to the activity in question, must be acting as a (1) "common carrier" (2) "by railroad" (3) in such commerce?

STATUTE INVOLVED

Each case involves § 1 of the Federal Employers' Liability Act, Act of Apr. 22, 1908, c. 149, § 1, 35 Stat. 63, as amended by Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404 (45 USC § 1). The statute reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and child of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASES

I. The Facts.

A. GILEO, EUFRAZIA AND EELK[4]

To meet the shortage in railroad equipment following World War II Southern Pacific Company (hereinafter referred to as SP) undertook a large program of acquiring new equipment for itself and others. Part of this program was to have outside financing. For part of this program the Board of Directors of SP on August 17, 1950, adopted a resolution for acquisition of 5,000 units of freight train equipment at an estimated cost of $25,797,500.00; 2,925 units for SP and 2,075 for Texas & New Orleans Railroad Company (T & NO). Included in the T & NO units were 1,000 gondola cars (gons) at an estimated cost of $4,300.00 each.[5] (R221, Def. ex. A.)

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4. The leading opinion of the Supreme Court of California was in *Gileo v. Southern Pacific Company*. In *Eufrazia* and *Eelk* that court noticed that "the construction project was the same as that involved in *Gileo v. Southern Pac. Co.*". Accordingly, unless otherwise indicated, we shall state the facts as they appear from the record in *Gileo* and the record references will be to the record in *Gileo*.

All record references are to pages of the transcript except that numbers following a colon refer to the line on the page indicated by the figure preceding the colon.

5. It is apparent from the lease (R 231ff) which is part of Def. Ex. H. (R 230) that this $25,797,500 program was itself only part of a larger program.

On September 15, 1950, Southern Pacific Equipment Company (SPEC), by resolution of its Board of Directors, determined to build 2,000 of the 5,000 units, including the 1,000 T & NO gons.[6] (R222, Def. ex. D). It was determined to build these 1,000 gons nos. T & NO 47,000 to 47,999, both inclusive, at the SP shops at Sacramento, California (R302). To this end SPEC purchased all the necessary materials (R67:4ff; 204:25ff)[7] and entered into a contract with SP under which SP agreed to furnish the necessary shop facilities and labor (R224, Def. ex. C). SPEC also entered into agreements, and agreements were entered into by others, for the fuller carrying out of the program as follows: The cars, when manufactured, would be delivered to The Pennsylvania Company for Banking and Trusts, trustee under an equipment trust, title would pass to the trustee, the trustee would acquire funds by the sale of equipment trust certificates, use these funds to finance the cars, after junior financing had been done, and then lease the cars to the SP with the privilege of subleasing to T & NO.[8]

At Sacramento, California, SP had general shops i.e., shops which in its organizational set-up were separate from the operating or transportation division. Included in these

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6. The estimated cost of the 2,000 units was $9,800,000 (R 222). Other equipment which SPEC undertook to acquire for the same general program it did not construct but bought from manufacturers. Such a transaction is illustrated by Def. Ex. N (R 300), SPEC's purchase order P-3071 placed with Pullman-Standard Car Manufacturing Company for 1,600, 40-foot 6-inch freight box cars of 100,000 pounds capacity each. SPEC also built cars for concerns other than S. P. (R 214:23).

7. Def. Ex. I and J (R 290, 292) are documents illustrative of the orders placed and method of payment.

8. The details are made to appear by the documents used, Def. Ex. D-H, incl. The obvious purpose of lease and sublease was to lend the credit of SP to the supplying of cars to T & NO.

shops was a passenger car shop and freight car shop No. 9. (R47:14ff; 136, 137; 198:13ff.)

Programs of constructing new cars at shop No. 9 began July 1, 1950 (R48:14ff; 199:23). At the time the plaintiffs were injured about 620 men were employed in this shop. Of these, 365 were carmen and helpers and of these 270 were employed in new car construction. The shop was divided into 2 departments, one doing repair work on equipment in service and the other doing new car construction. Each department was under the supervision of an assistant general foreman. The assistant general foreman in charge of new car building had under him foremen in charge of sections and crews on the assembly line for new car construction. (R47:25ff; 52:15ff; 59:15ff; 210:10ff.) The assembly line consisted of tracks upon which were fixed stations for designated work. The line was so planned that the work at each station would take about 25 minutes. At the end of each such period the whole line moved forward one station. The program called for turning out 18 cars per day. (R53:26ff; 57:24ff; 58:10ff; 212:4ff.)

New car construction was the "number one" program of shop No. 9 (R61:9ff). The work went on without interruption except from January 8, 1951 to February 12, 1951 when there was a shortage of materials (R56:10; 57:11ff). During this period the new construction forces were assigned to other work to keep them intact. On February 13, 1951, new car construction was resumed with 500 automobile cars. These were followed by the 1,000 T & NO gons. Up to the time of trial of *Gileo* these had been followed by 500 boxcars, 500 gons of one type and 400 gons of another type and another program of 1,500 boxcars was in progress. (R57:11ff; 59:15ff; 200:3ff.)

The work on the assembly line was so organized, and men so assigned to it, that if any man was absent from his place on the line the whole line would be stopped until that place was filled (R81:17ff; 213:15). Accordingly, if there were any absences of men on the assembly line their places were temporarily filled by men normally working in the repair department. But men assigned to the assembly line on new car construction were not taken out of it and were not used temporarily for other work.[9] (R58:24-65:16; 212:4-214:11; 215:25-216:5.)

Gileo, Eufrazia and Eelk were all injured while working on the assembly line in new car construction and on the program of construction of the 1,000 T & NO gons.[10] Gileo was injured July 11, 1951 while working on T & NO 47725 (R4:4-8; 5:21-25; 50:21-51:1, 197:14ff; 200). Eufrazia was injured on July 10, 1951 (R1255, 1256). Eelk was injured on June 22, 1951 working on car shop No. 506 [T & NO 47505] (R1438ff, 1447-1457, 1514).

Gileo went to work in the car shop in October, 1941 (R159:14) and worked in various portions of the shop. On February 12, 1951, he "bid in" as a freight carman welder and from that time on did no work except upon new car construction until he was injured. (R180:24ff; 161:7ff; 186:20) He first worked on automobile cars and then, from the time the gon program started in April, 1951, he worked without interruption on the gons (R163:26ff; 186:20ff).

Eufrazia was employed by SP in September 1950 as a helper (R1195);[11] was made an up-graded carman in March

9. If the men were taken off new car construction and put on repair work this was a permanent assignment. So long as a man was assigned to new car construction, however, he did nothing else.

10. See footnote 4 above.

11. All record references in this paragraph are to the record in *Eufrazia v. Southern Pacific Company*.

1951 (R1201) and on June 13, 1951, was assigned to new car construction on the gon program where he worked continuously until the time of his injury (R1255, 1256). After his assignment to new car construction this was the only work he did (1256, 1257, 1316).

Eelk was hired as a carman's helper in shop 9 on November 7, 1950. He worked on old equipment until December 1, 1950, when he was assigned to new car construction. He remained on new car construction, except when it was shut down January 8-February 12, 1951, on account of shortage of material. When new car construction was resumed on February 13, 1951, he went back to that work and remained at it continuously until he was injured. He did no other work. (R1447ff, 1473ff)

B. ARANDA[12]

For 40 or 50 years SP had operated a wheel foundry at Sacramento, California, for the manufacture of cast iron freight car wheels (R1069-1074). The wheels were manufactured solely upon annual order from the SP Store Department (R1081). No wheel was made for any particular car. The wheels went into stock in the Store Department which kept on hand a 40 to 60 day supply. (R1069, 1082) The foundry acquired its own raw materials and supplies (R1076) but had nothing to do with the ultimate assignment and distribution of the wheels for use (R1069, 1070, 1112). In 1950, 67,734 wheels were made and in 1951, 65,216 (R1071, 1072). The wheels were sold and distributed as follows: to car shop 9, for new car construction by SPEC, 9,266 in 1950 and 27,694 in 1951; to Northwestern Pacific Railroad, 926 in 1950 and 724 in 1951; to small users

12. All record references under this head are to the record in *Aranda v. Southern Pacific Company*.

16 in 1950 and 10 in 1951. (R1072) The remainder went to various departments of SP for use as replacements on its own cars and the cars of other railroads (R1073, 1074). In 1950 or 1951 SP also bought freight car wheels from independent manufacturers. (R1076)

Aranda, at the time he was injured on June 12, 1950, had been employed for some 11 years as a molder or molder's helper in the wheel foundry and he was working as such at the time he was injured. (R1091ff)

C. MORENO[13]

SP had 4 freight train yards near Roseville, California. Two were to the east near Roseville and there were 2 others a considerable distance to the west. Between the 2 yards at the east and the 2 at the west there was open country except for 2 main line tracks and 2 drill tracks. (R384-387) SP determined to build a new retarder yard in this open area. The project was a large one.[14] To carry it out the following was involved:

The drill tracks and all main line tracks were removed and a new main line was constructed about one-quarter of a mile to the north. (R379) Eighty additional acres of land were acquired (R389). Two power lines, a gas line, a telephone line and a telegraph line were removed (R397). The site was then graded to a new grade, above that of the old main. (R387, 391). The grading was done by an outside contractor and involved moving 300,000 cubic yards of earth. (R391, 392, 399). SP then went in with its own

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13. All record references under this head are to the record in *Moreno v. Southern Pacific Company*. The record below was gotten up in two parts each having its own page numbering. The first part had to do with the trial of the issue of jurisdiction. The second part had to do with the trial of the issue of negligence and damages. The record references here used are to the first part.

14. The total cost was a little over $1,000,000 (R 398:7).

forces (R399), a force specially organized for this work, and did the remainder of the work. (R376, 405, 406, 410). This called for the following: The installation of 2 main tracks leading eastward to the top of a "hump", installation of the 49 yard tracks to the east which called for 30 miles of track, 98 switches and 12 retarders, the construction of inspection pits at the point of entry to the new yard, the construction of rooms for the doing of necessary clerical work, the construction of 4 control towers, the installation of the air compressors and connections for operating the retarders and the installation of flood lights, new signals and a loud speaker and radio system. (R393-401).

Work on this new project began in April, 1951 (R377, 379). The SP forces went in the latter part of September, 1950 (R399). The new main line was in operation and removal of the old main line began October 1, 1951 (R379, 381, 387). Moreno was employed on October 2, 1951. He worked only upon construction of this new yard. (R416, 419, 426, 428). He was injured in December, 1951 (R421, 423). The first unit of the new yard, 21 tracks, was not opened and put into service until April 1, 1952, something over 3 months after plaintiff's injury (R381, 404).

The retarder yard was new not only as to location and construction but it was new in the manner of operation. The cars being switched and classified, after being shoved eastward up to the top of the hump, then continued by gravity and were handled by power operated switches and retarders, controlled from the control towers, and without the necessity of men riding the cars to control them and without hand throwing of switches in the field. (R377, 389) There is no evidence that any of the 4 old yards was to be abandoned.

II. Proceedings Below and Stage Therein and Manner in Which the Federal Questions Were Raised

A. GILEO

Gileo's complaint was filed in the Superior Court of the State of California in and for the City and County of San Francisco on October 8, 1951 (R3-6.) It was typical of complaints in action to recover damages for injuries under the Federal Employers' Liability Act. It alleged that defendant (petitioner here) at all times was a corporation "engaged in the business of a common carrier by railroad in interstate commerce" (par. I), that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged" in the conduct of interstate commerce (par. II) and that "this action is brought under and by virtue of the provisions of the Federal Employers Liability Act, 45 U.S.C.A. 51, et seq." (par. III). The remainder of the complaint is taken up with averments of the time and place of the accident, charges of negligence and averments of injury and damage.

By its answer, filed December 4, 1951 (R7-10), petitioner raised the federal questions. The answer admitted defendant's incorporation and that it was, "as a part of its business, engaged in the business of a common carrier by railroad in interstate and intrastate commerce" and was qualified as a self-insurer under the California statutes. (Par. I). It is admitted that plaintiff was employed by defendant in carshop 9 and the time and place of injury are admitted. (R7:21ff.) The remaining averments of the complaint, including those that defendant was a common carrier by railroad in interstate commerce and plaintiff was employed by it in such commerce and that the accident arose while the parties were so engaged, are denied (R8:3-14, par. I).

By notice of motion filed June 24, 1952, agreeably to Cal. CCP § 597 defendant moved "for an order to try separately the issues raised by paragraphs I, II and III of plaintiff's complaint and paragraph I of defendant's answer, namely whether this Court has jurisdiction of this action purportedly maintained under the Federal Employers' Liability Act, 45 USCA § 51, or whether under the Workmen's Compensation Act of the State of California the Industrial Accident Commission has exclusive jurisdiction of the plaintiff's claim:"[15] (R11, 12) On June 27, 1952 this motion was transferred to the presiding judge to be ruled and decided at the time of trial by the trial judge. (R 13).

At the beginning of the trial, and in his opening statement, counsel for the defendant, in outlining the matters to which the evidence would be directed, called to the attention of the jury the general character of the Federal Employers' Liability Act and the California Workmen's Compensation Act (R37-39) and then said:

"Those two statutes are mutually exclusive; if the state of facts is such that the case falls under the State statute and not under the Federal statute, then,

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15. Unless operation of the California Workmen's Compensation Act (Labor Code, Div. IV, § 3201ff) is excluded because the Federal Employers' Liability Act applies, the Workmen's Compensation Act provides the exclusive remedy of an injured employee, the tribunal having exclusive jurisdiction to enforce the remedy is the Industrial Accident Commission and courts are without jurisdiction to entertain an action by the injured employee against his employer. (Labor Code, §§ 3600, 3601, 5300, 5301; *Tipton v. Atchison etc. Co.*, 298 US 141, 80 L.ed 1091; *Scott v. I.A.C.*, 9 C2d 315, 70 P2d 940; *Esquer v. Teresi*, 105 CA 2d 89, 232 P2d 895; *Freire v. Matson Nav. Co.*, 19 C2d 8, 118 P2d 809; *I.A.C. v. Davis*, 259 US 182, 66 L.ed 888; *B. & M. R. Co. v. Armburg*, 285 U.S. 234, 76 L.ed 729; *Gaudet v. S. P. Co.*, 78 F. Supp. 651 (N.D. Cal.) aff'd on opinion below in 174 F2d 1022 (Cire. 9); *Hines v. I.A.C.*, 184 Cal. 1, 192 Pac. 859.) In *Raymond v. Chicago etc Co.*, 243 US 43, 44, 61 L.ed 583, 585 the issue was raised by pleading want of jurisdiction.

in the event of any dispute, the man's remedy is to go to the Industrial Accident Commission. If, on the other hand, the facts are such as to make the Federal statute apply, then his remedy is here.

"Now, the first matter, then, under the instructions his Honor will give you, and under the facts as you will find them, will be this question: Does the Federal Employers' Liability Act apply? Was this railroad, with respect to the work the man was doing, and in respect to his employment, engaged in the kind of activity that brings it under the Federal Act? And was the man, in doing the work he was doing, the type of employee to whom the Federal statute applies? Or, is the Federal statute non-applicable, and isn't this man's proper remedy—as we contend—to apply to the Industrial Accident Commission for an award of compensation, and take his compensation under the State Statute?" (R39)

The remainder of the opening statement, so far as pertinent here, then outlined what the defendant expected the evidence to show with respect to the new car construction program upon which Gileo was working. (R39-43). Testimony was then taken. So far as here pertinent what occurred during the trial can be best summarized by quoting from the judgment filed and entered July 21, 1952 (R19-22).

After reciting that the cause came on for trial the appearances, the impanelment of the jury, the making of opening statements and the introduction of evidence the judgment proceeds:

"By the pleadings and during the course of the trial the issues were raised, presented and tried whether the defendant was a common carrier by railroad engaged in interstate commerce and whether the plaintiff was employed by the defendant as such carrier in such commerce, whether any part of the duties of plaintiff was in furtherance of interstate or foreign commerce or in

any way directly or closely and substantially, affected such commerce, whether the act of the United States of America, in such cases made and provided, and known generally as the Federal Employers' Liability Act (45 USC § 51 ff), applied, whether the Court had jurisdiction of the cause and whether plaintiff's remedy, if any, was under the appropriate provisions of the Labor Code of the State of California and by application to the Industrial Accident Commission of the State of California. These issues were determined by the Court as matter of law as herein appears.

"During the course of the trial, it was stipulated by the parties that the issue of negligence on the part of defendant was conceded and should be resolved in favor of plaintiff, and that if plaintiff were entitled to judgment he was entitled to recover, as to amount, the sum of SEVEN THOUSAND DOLLARS ($7,000.00), that this should bear interest at the rate of 6% per annum from July 8, 1952 should judgment be in plaintiff's favor become final, but that judgment for plaintiff should be without costs in the trial court. There was no stipulation or agreement that plaintiff was entitled to judgment or that the Court had jurisdiction or that the Federal Employers' Liability Act (45 USC §§ 51 ff) applied or that defendant was an employer or plaintiff was an employee under or within the meaning of the Federal Employers' Liability Act (45 USC §51) but said issues were presented, tried, argued and submitted and the Court determined, ruled and ordered, as matter of law, that there was no issue of fact for the jury with respect to these reserved issues, and that resolving all possible conflicts in the evidence in favor of defendant and drawing all possible inferences of fact in favor of defendant, as matter of law defendant, with respect to its activities herein involved and in manufacturing new freight cars, was a common carrier by railroad engaging in interstate commerce and plaintiff was injured while he was employed by defendant and part of his duties as such employee was in further-

ance of interstate and foreign commerce and directly or closely and substantially, affected such commerce, that the Court had jurisdiction of the cause, and that the Court would so instruct the jury. Thereupon it was stipulated by the parties that in the light of and under such ruling of the Court there was no issue of fact to be passed on by the jury and, by consequence the formality of a verdict was unnecessary, the jury might be dismissed and all the reserved issues having been determined by the Court as matter of law, judgment should pass as ordered by the Court and the Court ordered that plaintiff have judgment.

"WHEREFORE, by reason of the law and the premises it is

"ORDERED, ADJUDICATED AND DECREED AS FOLLOWS:

"1. Resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law at the time and on the occasion when plaintiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 USC §§.51 ff) applied, there is no issue of fact and there is no matter for submission to a jury or for findings of fact and plaintiff is entitled to judgment as herein rendered.

"2. Plaintiff do have and recover of and from defendant the sum of SEVEN THOUSAND DOLLARS ($7,000.00) damages, with interest at the rate of 6% per annum from July 8, 1952, without costs in the trial court and that execution, unless stayed, issue accordingly.

"Done in open court this 17th day of July, 1952.

/s/ CLARENCE W. MORRIS
JUDGE OF THE SUPERIOR COURT"

From this judgment the defendant appealed to the District Court of Appeal, State of California, First Appellate District (R19-22). It is apparent from the judgment that the only questions there presented were those presented by this petition, for all other matters had been disposed of by stipulation.

On April 28, 1954 the District Court of Appeal rendered its opinion reversing the judgment (R327; App. 5; 124 ACA 951 and 269 P2d 150). Its conclusion was that the FELA did not apply and "that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser." Since the opinion is set out in full in the appendix (p. 5ff) there is no occasion for extensive quotation here and we respectfully refer the Court to the appendix.

Upon application of the respondent Gifeo the Supreme Court of California, on June 23, 1954, granted a hearing and transferred the cause into the Supreme Court for determination (R323). On April 29, 1955 it affirmed the judgment of the trial court. (R325; App. 13; 44 AC 566, 282 P2d 872).

B. MORENO

The complaint in the Moreno case was filed in the Superior Court of the State of California in and for the County of Sacramento on January 9, 1952. (R350-353).[16] The complaint was in three counts. Paragraph I of the First Count contains an averment as to the corporate capacity of defendant Southern Pacific Company and in addition alleges that "said defendant is now, and at all times mentioned herein has been, engaged in the business

16. See footnote 13 above.

of operating a series of railroad trains between several of the states of the United States for the transportation of passengers and freight for hire as a common carrier; that as a part of its said business defendant maintains and operates at the City of Roseville, County of Placer, State of California, certain railroad yards and repair facilities for its trains, and on or about the 19th day of December, 1951, employed plaintiff as a laborer to help keep defendant's said tracks in good repair; that at all times mentioned herein plaintiff was acting within the course and scope of his said employment." The remainder of the first count, paragraphs II, III and IV, consists of averments as to the time and place of the accident, charges of negligence, and averments as to injury and damage. The second count incorporates the first count except paragraph II, the charge of negligence, and adds a different charge of negligence. The third count contains a single paragraph which is simply a charge of negligence. The federal questions were raised by defendant's answer, which was filed on February 29, 1952 (R354-358). The answer admits the incorporation of the defendant, the general nature of its business and that plaintiff was employed by defendant as a laborer, but solely to assist in construction of a new retarder yard near Roseville, California. (R354:8-15) The other averments of the complaint as to plaintiff's employment, and specifically the averment that he was employed to help keep railroad tracks in repair, are denied. (R354:8-15) The absence of jurisdiction of the subject matter of the action is affirmatively pleaded (R355:23-356:2).[17]

The jurisdictional issue raised by defendant's answer was, by consent and agreeably to § 597 of the California Code of Civil Procedure tried separately before the court

17. See footnote 15 above.

without a jury (R623). The jurisdictional issue was tried on June 18, 1952. The evidence and argument at this special proceeding was devoted exclusively to the question of jurisdiction of the Superior Court under the Federal Employers Liability Act as opposed to the jurisdiction of the Industrial Accident Commission of the State of California under the state Workmen's Compensation Act. (R 375-433) On June 23, 1952, the trial court entered its order that "it has jurisdiction in said action." (R625: App. 19).

The case proceeded to trial on the other issues on July 15, 1952. The trial resulted in a verdict for plaintiff. (R359). A motion for judgment notwithstanding the verdict was made and granted. (R360-364) The opinion of the trial court which goes to the question of the negligence of the defendant is set out in full in the appendix. (p. 20, 21) Judgment notwithstanding the verdict was entered on July 22, 1952 (R364; App. 21).

Plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R365). Before a decision by that court, the case was transferred to the Supreme Court of the State of California (R628). The opinion of the Supreme Court of California says that "The first question presented is whether the Federal Employers' Liability Act is applicable". The court, following its decision in *Gileo*, concluded that the FELA applied, that there was evidence from which negligence might be inferred, and reversed the judgment of the trial court. (R617; App. 23)

C. ARANDA

Aranda was commenced by the filing of a complaint in the Superior Court of the State of California, in and for the County of Sacramento, on July 16, 1951. (R633-635) The

plaintiff sought to recover damages under the FELA. The complaint alleged that defendant was "engaged in the business of operating in interstate commerce a series of railroad trains for the hauling of passengers and freight for hire as a common carrier", that in connection with said business defendant maintained and operated in the City of Sacramento "certain railroad yards, shops, repair shops and foundries" and that plaintiff was employed in one of its said foundries. The rest of the complaint consists of averments as to the corporate capacity of the defendant, plaintiff's injuries and damages, and a charge of negligence.

In the amended complaint plaintiff repeated the allegations as to interstate commerce but made three charges of negligence in separate counts (R641-643).

Defendant's answer averred the defendant was engaged in the manufacture of railroad car wheels and other parts of railroad cars as well as in the business of common carrier by railroad in both interstate and intrastate commerce, that as a part of its manufacturing business, defendant maintained a wheel foundry in the City of Sacramento, and that at the time mentioned in the complaint, plaintiff, a molder's helper, was employed "exclusively in the construction of new railroad car wheels, and was not employed in interstate commerce." (R636)

By stipulation of the parties (R104ff ff)[18] the court, sitting without a jury, proceeded under § 597 of the Code of Civil Procedure of the State of California to hear the question of jurisdiction. The matter was set and testi-

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18 As in Moreno (see footnote 13 above) the Reporter's Transcript is in two parts, one for each part of the trial. The record is gotten up in an unusual way. At the opening of the second phase of the trial it was stipulated that the evidence taken on the first phase might be considered (R 6ff) and it appears as an exhibit to the Reporter's Transcript of the second phase.

mony was taken on December 11, 1951. On February 15, 1952, the trial court ordered that it had jurisdiction over the subject matter of the action, and that the Federal Employers' Liability Act was applicable (R1136).

The opinion of the judge who presided at the trial of the issue of jurisdiction, Honorable John Quincy Brown, is set forth in the appendix (pp. 28-33). The question decided is stated as follows:

> "This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this court, but before proceeding with the jury trial, it was stipulated that the court should first hear and determine the question of whether or not the Federal Employers' Liability Act was applicable. In other words, if this Act is applicable, then the plaintiff may sue in the Superior Court. If, on the contrary, the Federal Act is not applicable, the plaintiff must be governed by the Workman's Compensation Act, and the matter heard before the Industrial Accident Commission of the State of California."[19]

Aranda then proceeded to trial on the other issues on May 7, 8, 9 and 12, 1952. Defendant's motion for a directed verdict upon the ground, among others, that the trial court had no jurisdiction[19] was denied. (R997-998) Plaintiff had a verdict and defendant's motion for judgment notwithstanding the verdict, upon the same grounds as its motion for directed verdict was denied (R652). Defendant appealed to the District Court of Appeal, State of California, Third Appellate District, from a judgment entered on the verdict, and from the order denying its motion for judgment notwithstanding verdict. (R655)

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19. See footnote 15 above.

Before decision in the District Court of Appeal the case was, by order of the California Supreme Court, transferred to that court. (R1139).

On April 29, 1955, the California Supreme Court resolved the jurisdictional question in favor of plaintiff on the authority of *Gileo* and affirmed (R1122 ff; App. 35 ff).

D. EUFRAZIA

Eufrazia's complaint was filed in the Superior Court of the State of California in and for the County of Sacramento on July 3, 1952. It is substantially in the form of the complaint in *Gileo*. It alleges that defendant was a corporation "engaged in the business of common carrier by railroad in interstate commerce in California and other states" (Par. I), that plaintiff "was employed by defendant in such interstate commerce and the injuries herein complained of arose while plaintiff and defendant were so engaged in the conduct of said interstate commerce", that "this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 USCA § 51, et seq." (Par. II and III) and that plaintiff was injured as a result of defendant's negligence, (R1144-1148)[20]

The answer of defendant admitted generally that it was engaged in the business of a common carrier by railroad in interstate commerce but denied that plaintiff was employed in such interstate commerce and that said injury arose while plaintiff and defendant were engaged in the conduct of interstate commerce; admitted that plaintiff was employed by defendant as a carman in its new freight car manufacturing program being conducted in the defendant's railroad shops in the City of Sacramento and alleged that the Superior Court had no jurisdiction over the subject

20. The complaint is in four counts which differ only in the charges of negligence.

matter of any of the alleged causes of action in the complaint.[21] (R1149-1153)

On October 10, 1952, defendant filed a notice of motion pursuant to the provisions of Section 597 of the California Code of Civil Procedure for an order that the court proceed to the trial of the jurisdictional issue before trial upon the other issues of the cause (R1154). This motion was granted (R1157) and the trial on the special issue of jurisdiction was had on October 30, 1952 (R1190 ff). On December 31, 1952, the court rendered its opinion concluding that the plaintiff must seek his remedy under the California Workmen's Compensation Act and not under the Federal Employers' Liability Act. Findings of fact and conclusions of law were thereupon made pursuant to said opinion and on January 26, 1953, the judgment dismissing the action was made and entered. (R1158-1177; App. 40-54).

On January 28, 1953, plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R1178)

Before decision by the District Court of Appeal, the case was transferred to the Supreme Court of the State of California. (R1352) On April 29, 1955, the State Supreme Court, in a per curiam opinion, decided, upon the basis of its own decision in *Gilco*, that the Federal Employers' Liability Act applied and the judgment of the trial court was reversed. (R1347; App. 54).

E. EELK

The proceedings in *Eelk* were like those in *Eufrazio*. A complaint charging that defendant was at all times "engaged in the business of a common carrier by railroad in interstate commerce in said State of California and other

21. See footnote 15 above.

states" and that "plaintiff was employed by defendant in such interstate commerce, and the accident complained of arose while plaintiff and defendant were engaged in the conduct of interstate commerce" and that the action "is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. 51 et seq." was filed on July 6, 1951. The complaint is in four counts which are identical except for charges of negligence. (R1356-1361)

By its answer filed on August 15, 1951, defendant admitted the general averment as to its business, but denied the averments of paragraph II of the complaint that plaintiff was employed by defendant in interstate commerce and that the accident arose while plaintiff and defendant were engaged in the conduct of interstate commerce and denied the averments of paragraph III that the action was brought under the Federal Employers' Liability Act and affirmatively alleged the true fact that plaintiff was employed as a carman's helper and was engaged exclusively in working upon new railroad car construction. With the exception of the admissions indicated the averments of the complaint are denied. (R1362-1365)

By consent of the parties the jurisdictional issue was tried to the court, sitting without a jury, on June 12, 1952. (R1366) On February 9, 1953, the court filed its memorandum opinion, concluding that the Federal Act did not apply. (R1366, App. 57) The decision was rested upon the decision of the trial court in *Eufrazia*. Findings of fact and conclusions of law were filed on March 10, 1953, and on these judgment was entered for the defendant. (R1381-1385; App. 70-73).

Plaintiff appealed to the District Court of Appeal, State of California, Third Appellate District. (R1386) Before decision by the District Court of Appeal this case, together with *Moreno, Aranda and Eufrazia* was transferred to the

Supreme Court of the State of California. (R1526). On April 29, 1955, the State Supreme Court filed its per curiam opinion holding that the Federal Employers' Liability Act was applicable, upon the basis of its decision in *Gilco*, and reversed the judgment of the trial court. (R1522; App. 74).

III. Grounds of the Decisions Below

The short of the holdings of the Supreme Court of California was that where an employee of an employer which, as to some of its activities, is a common carrier by railroad in interstate commerce, is injured in the course of his work and claims that the injury resulted from the negligence of his employer the **sole**[22] test of application of the FELA is whether he falls within the extended area of application of the act as to **employees** resulting from the 1939 amendment of § 1 of the act which, re-enacting the first paragraph, added a new and second paragraph. The holdings are that it is immaterial whether the **employer,** as to the activity in question, is acting as a **common carrier** or a **railroad** (the test under the first and unchanged paragraph of § 1) if in a general sense it is a railroad (but *cf. contra Raymond*, p. 34 below), and that the only question is whether any part of the duties of the employee "shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce". The holdings are that the therefore established distinction between new construction (where the act did **not** apply) and repair and maintenance of existing facilities already devoted to common carriage by railroad in the interstate commerce (where the act did apply) has been abolished and that the manufacture of car wheels and new cars, and the construc-

22. Throughout all emphasis by boldface, whether in quoted matter or elsewhere, is ours.

tion of a wholly new yard, "further interstate commerce or affect it * * * 'directly or closely and substantially'," and that this is all that need appear.

The leading opinion of the Supreme Court of California is in *Gileo* followed, without discussion, in *Eufrazia* and *Eelk*. In *Gileo*, after briefly setting out the facts and quoting the statute the court said:

> "It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaged in interstate commerce.[23] This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way 'directly or closely and substantially.' (*Erickson v. Southern Pac. Co.*, 39 Cal.2d 374, 378 [246 P.2d 642])"

The court then said that the 1939 amendment was designed to include employees previously excluded and to eliminate confusion and hardship; that to this end doubt should be resolved in favor of application of the act. A number of cases were then referred to and it was said that the duties of Gileo "were at least as intimately connected with inter-

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23. With deference, the position of the defendant was not and is not so restricted. The defendant rested its position (in part) upon the opening provision of § 1 of the FELA, re-enacted in 1939 without change, which states that the liability being provided for is that of "every **common carrier** by **railroad while** engaging in commerce between any of the several states * * *." The defendant's position was that with respect to the activity in question it must not only be shown that the employer was "engaging in commerce between any of the several states" but also that in respect of such activity it was also a (1) "common carrier", (2) "by railroad".

state commerce" as in the cases cited.[24] The court continued:

> "Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (*New York Central R. R. Co. v. White*, 243 U.S. 188, 192 [37 S.Ct. 247, 61 L.Ed. 667]; *Raymond v. Chicago, M. & St. P. R. Co.*, 243 U.S. 43, 45 [37 S.Ct. 268, 61 L.Ed. 583]; see *Pedersen v. Delaware, L. & W. R. Co.*, 229 U.S. 146, 152 [33 S.Ct. 648, 57 L.Ed. 1125].) The only case decided after 1939, however, in which such a distinction was applied is *Moser v. Union Pac. R. Co.*, (1944) 65 Idaho 479 [147 P.2d 836, 153 A.L.R. 341], where a divided court held that an employee working on the construction of four miles of new track was not covered by the act. We cannot agreew ith the reasoning of the majority opinion in the *Moser case*. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way 'directly or closely and substantially,' regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce."

The opinion in *Aranda* really adds nothing. The procedure of the case is briefly stated and there is a brief statement of the facts. The court then said that "Federal cover-

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24. With deference, none of the cases cited, nor any other case under the FELA, goes nearly as far as the decisions now sought to be reviewed. The cases are more appropriately discussed below.

age has been extended to employees injured while performing duties similar to those involved here" (citing three of the cases cited in *Gileo*, with a brief statement of their facts). The remainder of the opinion on this point is as follows:

> "In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act (*Gileo v. Southern Pac. Co., ante*)."

The opinion in *Moreno* after a very brief statement of the proceedings and facts and the reference to two cases (to be dealt with below) disposes of the case on the basis of *Gileo* as follows:

> "In the present case, the construction was new, but the yard was intended as a substitue for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it 'in any way directly or closely and substantially.' (*Gileo v. Southern Pac. Co.*, ante; 45 U.S.C.A. § 51.)
>
> "We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (*Gileo v. Southern Pac. Co.*, ante)."

REASONS FOR ALLOWANCE OF THE WRIT

The Supreme Court of California has decided an important federal question of substance as to the scope and

effect of the 1939 amendment to § 1 of the Federal Employers' Liability Act which has not heretofore been determined by this court, except as a limited phase of the question was incidentally involved in a Longshoremen and Harborworkers' Compensation Act case, presently to be noticed, and the *Desper Case*, below. We have no way of knowing in how many cases in which there are no reported opinions some aspect of the question has been raised. Some aspect of the question has been raised in 82 cases (so far as we are aware) in which there have been published opinions. In one of these cases, under the Jones Act, an opinion was written by this Court (*Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L Ed 205). In 8 cases the question was whether the Federal Employers' Liability Act or the Longshoremen's Act applied. One of these cases reached this court and the rule established before the 1939 amendment of the Federal Employers' Liability Act was applied (*Penn. R. Co. v. O'Rourke*, 344 U.S. 334, 97 L Ed 367). The other 73 cases involved land-working railroad company employees. None reached this court and this court has never considered the scope or the effect of the 1939 amendment of the Federal Employers' Liability Act although it has, under other statutes, given consideration to the concept of interstate commerce and in this regard dealt with some of its own decisions under the FELA prior to the 1939 amendment. There is no warrant, in any decision of this court, for the length to which the Supreme Court of California has gone.

To the contrary the Supreme Court of California has decided an important federal question of substance in a way probably not in accord with applicable decisions of this court.

In most of the cases before the 1939 amendment the defendant, without question, was acting as a railroad in inter-

state commerce. The only serious question was whether the plaintiff was injured while he was employed by it "in such commerce". This court, nevertheless, had occasion to notice that this was not the sole test; that [under the ordinary rule that all words of the statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent" (*McDonald v. Thompson*, 305 U.S. 263, 266, 83 L ed 164, 166; *United States v. Lexington etc. Co.*, 232 U.S. 399, 410, 58 L ed 658, 662)] the opening words of § 1 could not be ignored and that the descripiton of the person upon whom liability was imposed by these words i.e., "every common carrier by railroad while engaging in commerce between any of the several states * * *", imported a **second** test which must be met before the statute could be applied. This language imports into the statute its own test for application of the statute because of the established proposition, ignored by the Supreme Court of California, that the mere fact that an employer is a common carrier by railroad in interstate commerce as to some of its activities does not give it that character as to all of its activities. (*Raymond*, p. 34 below.) There can be carriage by railroad without **common** carriage (*McCluskey v. Marysville & N. Ry. Co.*, 243 U.S. 36, 61 L ed 578 and *Bay v. Merrill etc. Co.*, 243 U.S. 40, 61 L ed 580, holding that the FELA did not apply); a railroad can be both a common carrier and a private carrier (*Santa Fe etc. Co. v. Grant Bros. Const. Co.*, 228 U.S. 177, 57 L ed 787; *Chenery v. Employers' Liab. Assur. Corp.*, 4 F2d 826 (Circ. 9)). These are the considerations which dictated the holdings that the FELA did not apply to a railroad company when it was a common carrier by **water** and **not by rail** (*So. Pac. Co. v. Jensen*, 244 U.S. 205, 213, 61 L ed 1086, 1097) or by elevator (*So. Ry. Co. v. Taylor*, 16 F2d 517 (Circ. Dist. Col.—cert. den. 273 U.S. 767, 71 L ed 882)).

The proposition that before the act can apply the test imposed by the opening language that the **employer**, with respect to the activity in question, must be acting as (1) a "common carrier", (2) "by railroad", (3) in interstate commerce was recognized by the first decision of this court dealing with application of the act and, until now, has never been questioned. In *Pedersen v. Delaware etc. R. Co.*, 229 U.S. 146, 57 L ed 1125, holding that the act applied to the repair and maintenance of instrumentalities devoted to and used in common carriage by railroad in interstate commerce and expressly distinguishing the cases of "construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce", the court said:

> "Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the **carrier**[25] is engaged in interstate commerce, and * * *. The true test of this is: Is the work in question a part of the interstate commerce in which the **carrier** is engaged?"

St. Louis, etc. Co. v. Seale, 229 U.S. 156, 158, 57 L ed 1129, 1133 said application of the act "turns upon whether the injuries which caused the death of the deceased were sustained **while the company was engaged**, and while he was employed by it, in interstate commerce." *Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 557, 60 L ed 436, 438, which evolved a definitive test for application of the act as it read before the 1939 amendment had this to say:

> "Thus it is essential to a right of recovery under the act not only that the **carrier** be engaged in interstate commerce at the time of the injury, but also that the person suffering the injury be then employed by the **carrier** in such commerce. And so it results where the carrier is also engaged in **intrastate commerce, or in**

25. All emphasis by boldface type is ours.

what is not commerce at all,[26] that one, while employed therein by the carrier, suffers injury through its negligence, or that of some of its officers, agents, or employees, **must look for redress to the laws of the state** wherein the injury occurs * * *."

Delaware etc. R. Co. v. Yurkonis, 238 U.S. 439, 445, 59 L ed 1397, 1400, held that the act did not apply where an employer, a common carrier by railroad in interstate commerce as to some of its activities, was engaged in mining its own coal. "The injury happened when plaintiff was preparing to mine coal and was not an injury happening in interstate commerce, and **the defendant was not then carrying on interstate commerce**—facts essential to recovery under the employers' liability act."

It would be profitless to review all the cases. In most there was no question as to the activity of the employer,—concededly it was common carriage by railroad in interstate commerce,—and the question discussed was the employment of the injured man. The cases dealing with new construction, however, deserve notice. *Raymond v. Chicago etc. Ry. Co.*, 243 U.S. 43, 61 L ed 583 held that the act did not apply to the construction of a new tunnel designed to shorten the main line of a railroad. "Raymond **and the railway company** were not engaged in interstate commerce." The result was reached "even although it be conceded that the railroad company was, in a general sense, engaged in interstate commerce". It was noticed that on the same day in *New York C. R. Co. v. White*, 243 U.S. 188, 61 L ed 667, where the same result had been reached as to a watchman of materials to be used in construction of a new station and track, the court held that "the admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the Federal Act." The work

26. As to what, for a **railroad**, is "commerce" see p. 41 below.

"bore no direct relation to interstate transportation, but had to do solely with construction work, which is clearly distinguishable" (citing the *Pedersen Case*, above). The same rule had theretofore been applied to the installation of a new station outhouse in a memorandum opinion in *Minn. etc. R. Co. v. Nash*, 242 U.S. 617, 61 L ed 531 reversing 131 Minn. 166 and 495, 154 NW 957 and 155 NW 1102.

Until the decisions below there was no hint or suggestion that the considerations just noticed have been changed or affected by the 1939 amendment of § 1 of the FELA. To the contrary everything, the decisions of this court included, points the other way.

There is no suggestion in the legislative history of the amendment that it was designed to enlarge the scope of application of the statute so far as the employer's activity was concerned. To the contrary the Senate Report to accompany the bill, S. 1708, in speaking of the enlargement of the area of the application of the statute stated simply that "it broadens and clarifies the law in its application to employees"; that it was designed to broaden the act to bring within it "employees of common carriers who, while ordinarily engaged in transportation of interstate commerce may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations." It further pointed out that the design was to cover employees "who are constantly shifting from one class of service to another" to provide uniform treatment. In dealing with employees it specified only two classes, (1) those "moving or working on cars or engines which had been temporarily withdrawn from interstate commerce" and (2) those "in railroad switching service" who are engaged in interstate or intrastate commerce several times during a single tour of duty.

The form of the amendment is itself significant. Section 1

as it read prior to the act was not changed. Nothing new is said of employers. There is no new definition of interstate commerce. To the contrary the whole of § 1 was re-enacted (without change and hence with the settled construction given to it). The amendment was only by adding a new and second paragraph dealing only with the definition of employees. The significance of this form of amendment has been noticed (see *Holl v. So. Pac. Co.*, 71 Fed. Supp. 21 (N.D. Cal.); *Ernhart v. Elgin etc. Co.*, 337 Ill. App. 56, 84 NE2d 868, 871).

To the limited extent to which this court has had occasion to consider the matter its holdings support what has just been said and are out of harmony with the decisions below. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 96 L ed 205, was an action under the Jones Act (46 USC § 688 which makes the FELA applicable to seamen) for damages for injuries received by one while working on a vessel on dry land in preparing it for the coming season and who, when the vessel was launched, was to be employed as a member of the crew. The plaintiff (petitioner) contended that the 1939 amendment of the FELA so enlarged its scope that the suit could be maintained under the Jones Act. This is the significant language of the opinion, so far as we are concerned with it:

> "We agree with the court below that the Amendment has no effect on the 'right or remedy' of railway employees **but merely redefines for the purposes of the Federal Employers' Liability Act the scope of the word 'employee'** to include certain persons not theretofore covered, because they were not directly engaged in interstate or foreign commerce."

Penn. R. Co. v. O'Rourke, 344 U.S. 334, 97 L ed 367, was an action by an injured railroad brakeman whose duties gen-

erally were in switching railroad freight cars in a railroad yard. He was injured while releasing hand brakes on freight cars that were on a car float, so that they might be pulled off the float. He sued under the FELA. The trial court held the Act did not apply and that the Longshoremen's Act (33 USC § 901ff) applied exclusively (99 Fed. Sup. 506). The Court of Appeals reversed on the ground plaintiff was doing railroad work and his employment was non-maritime (194 F2d.602,—Circ. 2). This court reversed, holding that the employment was "maritime" not from the nature of the employee's work **but because of the status of the employer**. The court said:

> "We are clear, however, that **emphasis on the nature of respondent's duties here misses the mark**. The statute [Harbor Workers' Act] applies, by its own terms, to accidents on navigable waters when the **employer** has employees engaged in maritime service. * * * Besides § 902(4) is directed at the **employer** when it speaks of maritime employment, not at the work the employee is doing. The exclusive coverage of §§ 903, 905 extends to an employee of an employer, made liable by § 904, when he is injured, in the course of his employment, on navigable water. The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for covering by the Compensation Act. * * * If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his **employer's** business, irrespective of whether he himself can be labeled 'maritime'."

In the cases here under review, under the authorities just noticed, the nature of the employees' activities and their relation to interstate commerce do not provide the sole test. The nature of the activity of the employer must be looked to. In none of the cases does the activity of the employer

live up to the requirements of the statute. The employer was not acting as a common carrier. It was not even acting as a carrier, much less a common carrier. The activities of the employer were not "by railroad",—the employer was engaged in the manufacture new freight car wheels and new freight cars (for use by another railroad), and in the construction of a new retarder yard.

This is sufficient for these cases without the further inquiry whether the employee was engaged in interstate commerce. Until June 6, 1955 this inquiry could, as readily, have been answered against the suggestion that the employer was so engaged on the authority of the *Raymond Case* and like cases above at p. 34. But this matter now poses an important and unresolved problem under the **Federal Employers' Liability Act** because of the decision on June 6, 1955 in *Mitchell v. Vollmer & Co.*, ... U.S. ...., 99 L ed (Adv. Op. 734, Oct. Term, 1954, No. 387).

Mitchell was an action under the Fair Labor Standards Act (29 USC § 201ff) and the question was of application of that act. Petitioner was working on a new unit of the Gulf Intracoastal Waterways, a new unit designed to furnish better passage into and across the Mississippi than that provided by the present Harvey Lock and Canal. It was held that the petitioner was engaged in interstate commerce within the meaning of the Fair Labor Standards Act. It was argued, and the lower courts had held, that the new lock was in the same category as the new tunnel in *Raymond v. Chicago etc. R. Co.*, 243 U.S. 43, 61 L ed 583, p. 34 above. This court was thus invited to follow *Raymond* or to overrule it. It did neither, but distinguished it. Upon a construction of the facts it was said that the work "is part of the redesigning of an existing facility of interstate commerce". Of *Raymond* it was said: "We do not think that case should

control this one. **We are dealing with a different act** of another vintage—one that has been given a liberal construction * * *." This is very far from disapproval of *Raymond* as a construction of the FELA and is very far from any intimation that in cases under the FELA the established construction of that Act will be departed from or should be departed from after re-enactment, without change,[27] in 1939 of the language with which we are here concerned by a Congress which we know was well aware of the settled construction which had been given to the act (see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131, 87 L ed 656, 662).

Rule 19 does not state as a consideration governing the granting of certiorari conflict between State courts in the decision of federal questions. But where, as under the Federal Employers' Liability Act, the ultimate determination of questions under the act has been left largely to the state appellate courts[28] we suggest that it is a matter for consideration that the decisions below are in square conflict with the decision of the Supreme Court of Idaho in *Moser v. U.P.R. Co.*, 65 Ida. 479, 147 P2d 336, a conflict made explicit by the language in *Gileo*,—"we cannot agree with the reasoning of the majority opinion in the *Moser Case*"—and by the

27. The cases are collected in Appendix B, "Opinions During the Past Decade Resting upon the Rule that the Reenactment of a Statute Carries Gloss of Construction Placed upon it by this Court", to the opinion of Mr. Justice Frankfurter in *Com'r v. Church*, 335 U.S. 632, 690, 93 L ed. 288, 323.

28. Under the FELA the jurisdiction of courts of the United States "shall be concurrent with that of the courts of the several states" (45 USC § 56) and "a civil action in any state court against a railroad" under 45 USC §§ 51-60 "may not be removed to any district court of the United States" (28 USC § 1445(a)) so that in the event of conflict between courts of the states relief from the conflict can be looked for by the railroads only in this court if the state courts persist in their holdings.

divergent holdings in *Moser* and *Moreno* both of which were cases of construction of new yards. *Moreno* is a much stronger case for non-application of the act because the project there was of much greater size, was not an alteration of existing facilities, was new in location and character and could not be classified as a mere adjunct to or improvement of existing facilities.

Passing from the activity of the employer to that of the employee, unless *Mitchell v. Vollmer & Co.*; p. 38 above, is to be controlling in cases under the FELA and *Raymond*, p. 34 above, and the cases which follow it are to be over-ruled,—and while *Mitchell* may cover *Moreno* it falls short of *Gileo, Eufrazia, Eelk and Aranda*,—the decisions below extend the area of application of the FELA far beyond that of any earlier case.

One basic proposition seems tolerably clear,—the 1939 amendment was not intended to sweep under the Act all employees of an employer which is a common carrier by railroad in interstate commerce. Had Congress intended this result and intended to risk the serious constitutional question it would have been a simple matter for it to say so and re-write § 1 of the Act in the language which led to the holding of the Act of 1906 (34 Stat. 232, c. 3073) unconstitutional (*Howard v. Ill. C. R. Co. and Brooks v. So. Pac. Co.*, 207 U.S. 463, 52 L ed 297). This was not done. The new and enlarged definition of "employee" was limited and circumscribed. As originally introduced the proposed amendment would have applied the Act to employees any part of whose duty was the furtherance of interstate commerce or "in any way" affected interstate commerce. In the course of enactment there was substituted for the words "in any way" the present and more restricted language "in any way **directly or closely and substantially**" affect interstate commerce.

(*Ermin v. Penn. R. Co.*, 36 F Supp 936, 938 (E. D. N. Y.); *Moser v. U. P. R. Co.*, 65 Ida. 479, 147 P2d 336, 343). This deliberate change must, in construing the statute, be given proper weight (*United States v. St. Paul, etc. Co.*, 247 U.S. 310, 318, 62 L ed 1130, 1134; *Fox v. Standard Oil Co.*, 294 U.S. 87, 96, 79 L ed 780, 787; *Helvering v. Wood*, 309 U.S. 344, 348, 84 L ed 796, 798; *Western U. T. Co. v. Lenroot*, 323 U.S. 490, 509, 89 L ed 414, 427).

In the business of a railroad the activities are not so self-classifying that the term "commerce" can be directly applied without more. This has been pointed out repeatedly. The business of railroads is transportation and, as to them, interstate commerce is interstate transportation. All persons attached to a railroad in some measure lend to the furtherance of its business. But this court had established that for them to be engaged in interstate commerce something more is called for and the test, first fully worked out in the *Shanks Case*, and later more fully explained, is whether the employee is "engaged in interstate **transportation** or in work so closely related to it as to be practically a part of it" (*Shanks v. Delaware etc. R. Co.*, 239 U.S. 556, 60 L ed 436; *I.A.C. v. Davis*, 259 U.S. 182, 66 L ed 888; *Chicago etc. Ry. Co. v. Bolle*, 284 U.S. 74, 76 L ed 173; *Chicago etc. R. Co. v. Ind. Com'n* 284 U.S. 296, 76 L ed 304; *New York etc. R. Co. v. Bezue*, 284 U.S. 415, 76 L ed 370). To be sure, under the 1939 amendment, this test no longer applies and the area of the application of the act has been enlarged. But it has been enlarged only to include those employees some part of whose duty is "the furtherance of interstate or foreign commerce; or shall, in some way directly or closely and substantially, affect such commerce" i.e. to employees whose duties are the furtherance of interstate **transportation** or work so closely connected to it as to be practically part of it, or directly or

closely and substantially affects such transportation or work that is practically a part of it.

Only in the most figurative sense could it be said that the work of any of the men here involved furthered interstate transportation or "directly or closely and substantially" affected it. The decisions below go beyond any of the cases. This is no place to review all of them. It is enough to say that the court below selected what it considered the strongest it could find (in the briefs below all of the cases were presented to the court and were reviewed) and none goes far enough to support the results below.

First as to the cases cited in *Gileo: Shelton*,[29] *S. P. Co. v. I. A. C.*[30] and *Trucco*[31] were cases of work in a railroad repair shop in connection with the repair of running equipment which had been dedicated to interstate commerce. *Brainard*[32] and *Ericksen*[33] involved assembly and inspection of equipment which was to be sent out immediately for installation in main line tracks. *Wills*[34] and *Jordan*[35] involved work on appurtenances to fixed structures dedicated to the general business of a railroad and, hence, to interstate commerce. *Agostino*[36] was the construction of new track which was to be only an improvement of a short section of existing main line and, whether rightly or wrongly, the case was put upon

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29. *Shelton v. Thomson*, 148 F2d 1 (Circ. 7).

30. *So. Pac. Co. v. Ind. Acc. Com'n*, 19 C2d 283, 120 P2d 888.

31. *Trucco v. Erie R. Co.*, 353 Pa. 320, 45 A2d 20.

32. *Brainard v. Atchison etc. Ry. Co.*, 87 F. Supp. 921 (D.C. Kan.).

33. *Ericksen v. So. Pac. Co.*, 39 C2d 374, 246 P2d 642.

34. *Wills v. Terminal R Ass'n of St. Louis*, 239 Mo. App. 1144, 205 SW 2d 942.

35. *Jordan v. Baltimore & O. R. Co.*, 135 W. Va. 183, 62 SE 2d 806.

36. *Agostino v. Penn. R. Co.*, 50 F. Supp. 726 (E.D. N.Y.).

the ground that this was maintenance of the main line and not new construction. No additional cases were cited in the other opinions. So far as we are aware every case in which there was a published opinion was called to the attention of the court below with the exception of *Straub v. Reading Co.*, 220 F2d 177 (Circ. 3) not decided until March 10, 1955. It held that the Act applied to an assistant chief time-keeper who had supervising duties which included seeing that men operating trains were properly paid and that the Hours of Service Act was not violated,—he was no mere clerk as in the *Holl Case*, p. 36 supra,—but even so the court characterized the case as "definitely a border-line case."

We believe that the matter need not be, and should not be, enlarged upon in view of the recent decision of this court in *Mitchell*, p. 38 above and upon this phase the case, in the light of *Mitchell*, can be put in these terms: Is this court now ready to overrule *Raymond v. Chicago etc. Ry. Co.*, 243 U.S. 43, 61 L ed 583 and to agree with the court below that the established distinction between maintenance and repair upon the one hand and manufacture of new construction upon the other is to be obliterated by judicial action and is this court now to remove its Congressionally approved gloss to the first paragraph of § 1 of the Act with which that paragraph was reenacted in 1939 without legislative suggestion of change except as to the definition of "employee"?

It is respectfully submitted that the questions presented are ripe for determination by this court, should be determined by this court and that the writ of this court should issue to review the decisions below.

Respectfully submitted,

ARTHUR B. DUNNE
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Attorneys for Petitioner
Southern Pacific Company

APPENDIX

Gileo vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California, in and for the City and County of San Francisco

No. 411036

CHARLES M. GILEO,
Plaintiff,
v.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant.

Judgment, trial court:

(Title of court and cause omitted.)

JUDGMENT

The above entitled cause came on duly and regularly for trial before the above entitled Court, Department No. 18 thereof, Honorable Clarence W. Morris, a judge of said Court, presiding, the Court sitting with a jury, on Monday, July 7, 1952 on the issues made by plaintiff's complaint and defendant's answer and the cause was thereupon tried and determined. Upon said trial plaintiff appeared in person and by his attorneys Messrs. Hildebrand, Bills & McLeod, Clifton Hildebrand, Esq., and Sheridan Downey, Esq., Jr.,

and defendant appeared by its attorneys Messrs. Dunne, Dunne & Phelps and Arthur B. Dunne, Esq. A jury was impaneled and sworn to try the cause, opening statements on behalf of the parties were made by their respective counsel, evidence, both oral and documentary, was introduced and the cause was then submitted for decision as herein appears.

By the pleadings and during the course of the trial the issues were raised, presented and tried whether the defendant was a common carrier by railroad engaged in interstate commerce and whether the plaintiff was employed by the defendant as such carrier in such commerce, whether any part of the duties of plaintiff was in furtherance of interstate or foreign commerce or in any way directly or closely and substantially, affected such commerce, whether the act of the United States of America, in such cases made and provided, and known generally as the Federal Employers' Liability Act (45 USC § 51 ff), applied, whether the Court had jurisdiction of the cause and whether plaintiff's remedy, if any, was under the appropriate provisions of the Labor Code of the State of California and by application to the Industrial Accident Commission of the State of California. These issues were determined by the Court as matter of law as herein appears.

During the course of the trial, it was stipulated by the parties that the issue of negligence on the part of defendant was conceded and should be resolved in favor of plaintiff, and that if plaintiff were entitled to judgment he was entitled to recover, as to amount, the sum of SEVEN THOUSAND DOLLARS ($7,000.00), that this should bear interest at the rate of 6% per annum from July 8, 1952 should judgment be in plaintiff's favor become final, but that judgment for plaintiff should be without costs in the trial court. There

was no stipulation or agreement that plaintiff was entitled to judgment or that the Court had jurisdiction or that the Federal Employers' Liability Act (45 USC § 51 ff.) applied or that defendant was an employer or plaintiff was an employee under or within the meaning of the Federal Employers' Liability Act (45 USC § 51) but said issues were presented, tried, argued and submitted and the Court determined, ruled and ordered, as matter of law, that there was no issue of fact for the jury with respect to these reserved issues, and that resolving all possible conflicts in the evidence in favor of defendant and drawing all possible inferences of fact in favor of defendant, as matter of law defendant, with respect to its activities herein involved and in manufacturing new freight cars, was a common carrier by railroad engaging in interstate commerce and plaintiff was injured while he was employed by defendant and part of his duties as such employee was in furtherance of interstate and foreign commerce and directly or closely and substantially, affected such commerce, that the Court had jurisdiction of the cause, and that the Court would so instruct the jury. Thereupon it was stipulated by the parties that in the light of and under such ruling of the Court there was no issue of fact to be passed on by the jury and, by consequence the formality of a verdict was unnecessary, the jury might be dismissed and all the reserved issues having been determined by the Court as matter of law, judgment should pass as ordered by the Court and the Court ordered that plaintiff have judgment.

WHEREFORE, by reason of the law and the premises it is ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Resolving all conflicts in favor of defendant and drawing all permissible inferences of fact in favor of defendant, as matter of law at the time and on the occasion when plain-

tiff was injured defendant, with respect to activities on its part connected with said injury, was a common carrier by railroad engaged in interstate commerce and plaintiff at said time and on said occasion was employed by it and as such employee part of his duties was the furtherance of interstate or foreign commerce and directly or closely and substantially affected such commerce, the Federal Employers' Liability Act (45 USC § 51 ff) applied, there is no issue of fact and there is no matter for submission to a jury or for findings of fact and plaintiff is entitled to judgment as herein rendered.

2. Plaintiff do have and recover of and from defendant the sum of SEVEN THOUSAND DOLLARS ($7,000.00) damages, with interest at the rate of 6% per annum from July 8, 1952, without costs in the trial court and that execution, unless stayed, issue accordingly.

Done in open court this 17th day of July, 1952.

CLARENCE W. MORRIS
Judge of the Superior Court

(File and recording endorsements omitted.)

Opinions and judgment on appeal:

In the District Court of Appeal of the State of California.
First Appellate District, Division Two.

Civil No. 15612

CHARLES M. GILEO,
Plaintiff and Respondent,
vs.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Appellant.

This is an appeal from a judgment of $7000 awarded to plaintiff Gileo for injuries suffered while working as a carman welder for defendant railroad. Plaintiff's action was based on Federal Employers' Liability Act (45 USC § 51).

Southern Pacific (SP) following World War II undertook a program of acquiring new equipment. Some of the equipment was to go to an SP subsidiary, the Texas & New Orleans Railroad Company (T & NO). In August of 1950 the Board of Directors of SP adopted a resolution to acquire 5000 units of freight train equipment. Some of the equipment was assigned to SP and some to T & NO. Included in the assignment to the latter were 1000 gondola freight cars (gons). The gons were to be built in the SP shops at Sacramento. The Southern Pacific Equipment Company (SPEC) determined to build 2000 of the units including the 1000 gons assigned to T & NO. The SPEC purchased the necessary materials and entered into a contract with SP under which SP agreed to supply the shop facilities and labor. The

labor force worked for SP. SP paid them and billed SPEC for such labor costs.

The SPEC contracted with George Smith and H. J. Wylie, purchasers, to construct, sell and deliver the cars to them. The purchasers then assigned the contract to the Pennsylvania Company for Banking and Trusts pursuant to an agreement made by Smith and Wylie with the Pennsylvania Banking Company and the SP. The Bank was trustee of the Southern Pacific Company Equipment Trust. The SPEC billed the Bank and transferred title to it as trustee.

The Bank then leased the equipment to the SP or to T & NO, as the case might be.

At Sacramento SP has general shops separate from the operating or transportation division. One of these general shops was car shop No. 9, and the new cars were to be constructed there.

Construction began on July 1, 1950. The car shop was divided into two departments, one doing repair work and the other doing new car construction.

The new car construction was done in assembly line fashion on two tracks. The work was interrupted only two days by inclement weather and once due to shortage of materials for approximately one month from the time the work began to the time of trial. During the period when there was a shortage of materials for new construction the construction crews were assigned to repair work in order to keep the force intact. This was before Gileo was assigned to new car construction.

All the men working for SP were on one seniority list and there was no bidding done for an individual job as such. If a man bid for a job in shop No. 9, he would be assigned to a particular job by the supervising staff.

Because of the importance of new car construction, a man assigned to this work was assigned on a continuous basis. However the number of men working on construction varied with the type of car being built. For example 425 men worked on the constguction of automobile cars, but only 270 men worked on gons. There was approximately a 10% absenteeism rate and in order to keep the assembly line moving these vacancies were temporarily filled with men working in the repair department. But the men assigned to new construction were not moved temporarily to other jobs in case of short breakdowns and if assigned to other departments were done so on a permanent basis.

Gileo first went to work for SP in the car shop at Sacramento in October 1941. He worked as a helper and apprentice learning the business and became a journeyman carman in April 1946. He also became qualified as a welder.

In February 1951 Gileo bid in for a job as welder in car shop No. 9. He worked on new automobile cars and after that worked on new gondola cars up until the time he was hurt on July 11, 1951. Gileo returned to work on the second day after the accident and again worked on gons, until he bid in as an inspector in the car machine shop. Later as a result of the injury he began having recurrent headaches which forced him to leave work from time to time.

Gileo began working on the construction of new gons in April 1951 and from that time until he was hurt he was never assigned any repair work. From February to July he remembers a couple of times in which he did repair work. This work consisted of repairing a machine that had broken down and this machine was used in the construction of new cars.

It was stipulated by both parties that the issue of negligence be decided in favor of plaintiff, that if given judg-

ment he recover $7000 in damages, that the court discharge the jury and rule as a mater of law whether or not the Federal Employers' Liability Act (FELA) applies in this fact situation. The court ruled that as a matter of law at the time plaintiff was injured defendant with respect to its activities connected with the injury was a common carrier engaged in interstate commerce and that the plaintiff's duties as employee included the furtherance of interstate commerce and directly and substantially affected such commerce. It therefore held that FELA is applicable as a matter of law.

The sole contention of appellant is that FELA is not applicable in this fact situation and therefore the trial court had no jurisdiction.

FELA was first passed in 1906 but was declared unconstitutional by the Supreme Court because it gave Congress the power to regulate subjects outside of its scope of authority. In 1908 the Act was made more restrictive in its application to interstate commerce and therefore its constitutionality was sustained. In 1939 the Act was amended because under the case decisions it was necessary that the employee be engaged in interstate commerce at the very moment of injury to fall under the Act. This brought about harsh results in many cases. Therefore the amendment provided that employees "any part of whose *duties as such employee* shall be the furtherance of interstate . . . commerce; or shall in any way *directly* or *closely* and *substantially affect such commerce* . . . shall . . . be considered as entitled to the benefits of this chapter." (Emphasis ours.)

The only change made by the 1939 amendment was to give a new definition to the term "employee". In 10 A.L.R. 2d 1279 beginning at page 1281 a quotation from the Senate Judiciary Committee's deliberations on this amendment is

made. This quotation recognizes that the difficult question of fact presented in many cases of whether or not at the moment of injury the injured person was engaged in interstate commerce resulted in unfair consequences because of needless expensive litigation and statute of limitations barriers if the plaintiff chose the wrong remedy. Consequently by this amendment Congress wished to abolish the requirement that the employee must be actually engaged in interstate traffic at the moment of injury. However the change from the "moment of injury" test to the "duties as such employee" test still leaves a twilight zone in which the courts must make difficult fact decisions. Both parties agree that the only case squarely considering the question whether an employee of a railroad engaged exclusively in new construction is covered by the FELA is Moser v. Union Pacific Railroad Co., 147 P.2d 336. In that case the Idaho Supreme Court held that a member of a construction crew engaged in the construction of new tracks and switches and a large icing dock was not covered by the FELA. This decision was by a closely divided court.

We need not decide whether this case was correctly decided on its facts, because in our case SP was not engaged in directly manufacturing new cars for its own use. It was manufacturing the cars under contract with a separate corporation and after their manufacture title was transferred to another corporation which in turn leased the cars to SP or, in the case of the gons on which Gileo was working for a considerable period before his injury, to T & NO, a different railroad company. Under the facts of this case we are satisfied that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser.

The more difficult question arises from the facts that Gileo was employed generally in the carshop and that he could at any time have been assigned to the repair work being done in the carshop, as evidenced by the fact that before he entered the carshop the crew engaged in new car construction was in fact transferred to repair work in the shop during the period when there was a shortage of material for new car construction. From these facts can it be said that a "part" of Gileo's "duties" "directly or closely and substantially" affected interstate commerce?

The question is pointed up by three decisions which seem most closely in point. In Wright v. New York Cent. R. Co., 33 N.Y.S. 2d 531, quoting from the opinion: "Claimant usually worked in intrastate commerce for five days a week and in interstate commerce for one day a week . . . when injured, he was engaged in intrastate commerce." The court held that since a part of the claimant's duties were in interstate commerce he was covered by the FELA even though on the day of his injury he was engaged exclusively in intrastate commerce. This case was affirmed by the Court of Appeals (43 N.E. 2d 97) and the U. S. Supreme Court denied certiorari (317 U.S. 668).

In Scarborough v. Pennsylvania R. Co., 35 Atl. 2d 603, a railroad signalman whose duties were generally in interstate commerce had for three weeks been engaged in installing new station lights when he was injured. The court held that even if this installation work did not fall under the definition of the FELA, i.e., if at the time of injury his work was exclusively intrastate, a part of his duties were in interstate commerce. The court said (p. 606): "Taking into consideration that Scarborough's general duties were in interstate commerce, and that he was subject to call at all times for such service . . . he continued to be employed as a

signalman. . . . He was subject to call to do temporary work, such as he was doing when injured, but the fact remains that he was always available to perform his general duties, which were in the furtherance of interstate commerce."

In Robinson v. Pennsylvania R. Co., 113 F. Supp. 863 a railroad carpenter was a member of a bridge repair crew which at times worked on railroad bridges and at times on highway bridges which crossed the railroad tracks. For almost 2 months before his injury he had been engaged exclusively in repairing a highway bridge. The court assumed that this work was exclusively intrastate, but none the less held that a part of the claimant's duties were in interstate commerce, saying (p. 865):

"Perhaps there may be situations where a railroad employee, whose work includes duties of both an interstate and intrastate nature, is engaged in work of an intrastate nature for so long a period that he will lose the coverage of the Act, but the present case, in my opinion, does not involve one of these situations."

These three cases have broadly construed the FELA to include within its scope employees who for a considerable period of time (5 days, 3 weeks, nearly 2 months) have been employed exclusively in intrastate commerce, where the general scope of duties performed by them over a longer period has included and would continue to include interstate employment.

The line must still be drawn somewhere. By adopting the "any part of whose duties" test the Congress has abolished the "moment of injury" test, but it has still left open the question under what circumstances may it be said that any part of an employee's duties closely affect interstate commerce.

In each of the three cases above discussed the employee was not only subject to assignment to interstate duties, but had previously been engaged in interstate duties in the very employment and presumably would soon be engaged in interstate duties again. In the case before us, under the practice adopted by SP, Gileo from the moment he entered the carshop on February 12, 1951, and was assigned to new car construction until the time of his injury 6 months later was employed exclusively in new car construction. He could have been assigned to repair work but in practice he was not, and would not be, so long as the new car construction continued and the materials for new car construction were available. The bare possibility of future assignment to repair work standing alone, does not seem to us sufficient to make "any part of his duties" affect interstate commerce within the meaning of the FELA. The test must be a practical, not a purely theoretical one. No case has gone so far as to hold that an employee whose immediate work over a long period of time has been exclusively in intrastate commerce, and no part of whose work in the past in that particular employment has been in interstate commerce, is covered by the FELA because of the possibility only that he might have been assigned to interstate employment at any time. We are satisfied under the facts of this particular case that respondent was not covered by the FELA.

Judgment reversed.

DOOLING, J.

We concur:
NOURSE, P. J.
KAUFMAN, J.

(File endorsement omitted.)

In the Supreme Court of the State of California In Bank

S. F. 19090

CHARLES M. GILEO,
Plaintiff and Respondent,
v.
SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant and Appellant.

Filed Apr 29 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

Plaintiff was employed by defendant, a common carrier by railroad, when he was injured while working on the construction of new railroad cars. In this action, which was brought under the Federal Employers' Liability Act, the parties stipulated to the existence of negligence and the amount of plaintiff's damages. The sole question left for determination was whether the act was applicable. The trial court concluded that plaintiff was entitled to the benefits of the act, and defendant has appealed from the ensuing judgment.

In February 1951, after being employed by defendant for ten years to repair railroad cars already in service, plaintiff began working as a carman welder on the construction of new cars. The cars were being built in accordance with a resolution adopted by defendant's board of directors which provided for the acquisition of 5,000 new cars and for their assignment to defendant and a subsidiary, the Texas and New Orleans Railroad Company. Another subsidiary, the

Southern Pacific Equipment Company, undertook the construction of 2,000 of the units, including 1,000 gondola cars allotted to the Texas Company. Defendant supplied the labor and shop facilities, paid the workmen and billed the equipment company for labor and certain other maintenance costs. The gondola cars, when completed, were to be shipped out of state and leased to defendant, which, in turn, was to sublease them to the Texas Company. Plaintiff was injured in July of 1951 while "welding corners" on one of the gondola cars.

In the shop where plaintiff worked there was a department for repairs and another for new construction, and positions in both departments were filled from the same seniority list. Every day some of the employees ordinarily engaged in making repairs were placed on new construction in order to offset vacancies created by absenteeism. Men on new construction could be transferred to repair work, and this was done on a few occasions, but plaintiff worked exclusively on new construction after being assigned to it.

The Federal Employers' Liability Act provides in part:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall,

for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (53 Stats. 1404; 45 U.S.C.A. § 51.)

It is the position of defendant that it is not liable under the act unless it can be said that in manufacturing railroad cars it was engaging in interstate commerce. This argument overlooks the effect of the second paragraph of the section quoted above, which was added by amendment in 1939. Under that paragraph, plaintiff is considered to have been employed by defendant in interstate commerce and is entitled to the benefits of the act if his duties were in the furtherance of such commerce or affected it in any way "directly or closely and substantially." (Ericksen v. Southern Pacific Co., 39 Cal. 2d 374, 378.)

The 1939 amendment was enacted to include injured employees previously excluded and to eliminate confusions and hardship to which they were subjected in choosing whether to bring suit under state or federal law. (See Shelton v. Thomson, 148 F. 2d 1; Wright v. New York Cent. R. Co., 33 N.Y.S. 2d 531; Ermin v. Pennsylvania R. Co., 36 F. Supp. 936, 940; Sen. Rep. No. 661, 76th Cong., 1st Sess. (1939).) In order to effectuate the purposes of the amended act, all doubt should be resolved in favor of its applicability. (See Lewis v. Industrial Acc. Com., 19 Cal. 2d 284, 286.)

The duties of plaintiff were at least as intimately connected with interstate commerce as those involved in a number of cases where the act, as it now reads, has been applied. (Shelton v. Thomson, 148 F. 2d 1 [operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which moved in interstate commerce]; Brainard v. Atchison, Topeka & Santa Fe Ry. Co., 87 F. Supp. 921 [assembling railroad switches

and "frogs" later to be installed on lines of track, including the main line carrying interstate commerce]: Agostino v. Pennsylvania R. Co., 50 F. Supp. 726 [constructing new tracks to replace existing tracks used in interstate commerce]; Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 [inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used in repairing tracks carrying interstate traffic]; Southern Pac. Co. v. Ind. Acc. Com., 19 Cal. 2d 283 [repairing a freight car used in interstate and intrastate commerce]; Wills v. Terminal R. Ass'n of St. Louis [Mo. App.], 205 S.W. 2d 942 [installing a ventilating pipe in the roof of a building in which iron parts were forged for use in repairing equipment, including some used in interstate commerce]; Trucco v. Erie R. Co. [Pa.], 45 A. 2d 20 [constructing "strap hangers" used to replace parts in engines, some of which were devoted to interstate commerce]; Jordan v. Baltimore & Ohio R. Co. [W. Va.], 62 S.E. 2d 806 [laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced].)

Before the broad language now appearing in the act was added by the amendment in 1939, some decisions indicated that there was a distinction between an employee repairing equipment already operating in interstate commerce and one constructing equipment later to be used in that commerce, and it was held that the latter did not have federal coverage. (New York Central R. R. Co. v. White, 243 U.S. 188, 192; Raymond v. Chicago, Mil. & St. P. Ry. Co., 243 U.S. 43, 45; see Pedersen v. Delaware, Lack. & West. R. R. Co., 229 U.S. 146, 152.) The only case decided after 1939, however, in which such a distinction was applied is Moser v. Union Pac. R. Co. (1944) [Ida.], 147 P. 2d 336, where a divided court held that an employee working on the con-

struction of four miles of new track was not covered by the act. We cannot agree with the reasoning of the majority opinion in the Moser case. Under the language added by the amendment, an employee of a common carrier by railroad is entitled to the benefits of the act if his duties further interstate commerce or affect it in any way "directly or closely and substantially," regardless of whether the work which he is doing may be classified as new construction or repairs. The cars on which plaintiff was working were intended to be used in interstate commerce, and it is clear that the construction of the cars furthered such commerce.

The judgment is affirmed.

GIBSON, C. J.

We concur:
SHENK, J.
EDMONDS, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

S. F. No. 19090

CHARLES M. GILEO,
Plaintiff & Respondent,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant & Appellant.

On appeal from the Superior Court in and for the City and County of San Francisco Superior Court No. 411036

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the City and County of San Francisco in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Moreno vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 88793

Epimenio Moreno
Plaintiff,

vs.

Southern Pacific Company, a corporation,
Defendant.

Order as to jurisdiction, opinion, and judgment, trial court:

(Minute Order—Title of court and cause omitted.)

Dept. Four

Monday, June 23rd. A.D. 1952.

Hon. J. O. Moncur, Judge Presiding.

TRIAL ON SPECIAL DEFENSE BEFORE TRIAL OF ANY OTHER CAUSE . . . *ORDER.*

(Submitted June 18, 1952)

The above entitled cause having been heretofore duly and regularly heard, argued and submitted to the Court by respective counsel and by the Court ordered Submitted, and now on this day the Court being fully advised in the premises made the following order to-wit:

"Court Determines It Has Jurisdiction in Said Action".

(Title of court and cause omitted.)

OPINION

The above entitled action was tried with a jury. At the conclusion of plaintiff's evidence a motion for a non-suit was made by defendant, which motion was denied by the Court. At the conclusion of the evidence in the case, and before argument, defendant moved for a directed verdict, which motion also was denied by the Court. After arguments by respective counsel and instructions by the Court, the jury returned a verdict in favor of plaintiff in the sum of $5,000, and thereupon defendant moved for judgment for defendant notwithstanding the verdict of the jury.

It is the contention of defendant that the evidence in this case failed to show any negligence on the part of defendant, and particularly that there was no evidence that if any negligence was shown, it was not a proximate cause of the accident.

It appears that plaintiff was employed by defendant near Roseville, California, in setting rails for a track in the switch yard of defendant. These rails were handled by a crane acting under power, and plaintiff, with another, was guiding the rails into place on the ties. As a rail was being lowered and plaintiff was holding the end of the rail, it appears that the rail diverged to some extent from a parallel line with the track to which it was to be attached, and as plaintiff was holding the rail his foot slipped so that the rail came in contact with his foot and occasioned the injuries set forth in the complaint. It appears that plaintiff's foot slipped on a metal plate which apparently was on the ground near his foot. There is no evidence that the defendant knew of the presence of the metal plate at that particular place or that plaintiff saw the plate or knew

that it was there. It appears from the evidence that the ground was wet but it does not show whether the plate was covered or was visible. The evidence does not show that defendant was guilty of any negligence whatsoever in the operation of the crane and if any negligence could be imputed to defendant it must be by reason of the presence of the metal plate on the ground upon which the plaintiff slipped, unless it can be said that the presence of this metal plate at that particular place would justify a finding that the presence of said metal plate rendered the area where plaintiff was employed an unsafe place for plaintiff to work.

It is my opinion that the evidence will not support a finding of negligence on the part of the defendant based upon the allegation that the place where plaintiff was working was an unsafe place.

I conclude that this unfortunate accident was unavoidable and not due to any negligence on the part of either party to the action. Therefore the motion for a judgment for defendant notwithstanding verdict of the jury will be granted and it will be so ordered.

Dated: July 21, 1952.

J. O. Moncur
Judge

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT NOTWITHSTANDING VERDICT

This cause having come on for trial on June 18, 1952, before the above entitled Court, without a jury, on the special issue raised by the answer of the above named defendant that the Court has no jurisdiction over the subject matter of said action, and the plaintiff appearing per-

sonally and by his counsel, NATHANIEL S. COLLEY, Esq., and the defendant appearing and by its counsel ARTHUR B. DUNNE, Esq., and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and said issue having been submitted for decision, and the Court having decided said issue in favor of the plaintiff and having ordered plaintiff's counsel to prepare and submit findings of fact and conclusions of law (which have not yet been submitted), and

This cause having come on for trial on its merits before the above entitled court and jury on July 15, 1952, plaintiff appearing personally and by his counsel NATHANIEL S. COLLEY, Esq., and defendant appearing and by its counsel DEVLIN, DIEPENBROCK & WULFF, and oral and documentary evidence having been adduced and defendant having timely made a motion for a directed verdict, which motion was denied but should have been granted, and the jury having rendered its verdict in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00), and prior to the entry of judgment on said verdict, said defendant having moved for a judgment notwithstanding said verdict, and it appearing to the satisfaction of the court that said motion should be granted, and good cause appearing therefor,

IT IS NOW ORDERED, ADJUDGED AND DECREED as follows, to-wit:

1. That the verdict rendered by the jury in the above entitled action on July 18, 1952, in favor of plaintiff and against defendant in the sum of Five Thousand Dollars ($5,000.00) be, and the same is hereby set aside.

2. That the plaintiff take nothing by reason of the above entitled action and said action be, and the same is hereby dismissed, and defendant SOUTHERN PACIFIC COM-

PANY, a corporation, do have and recover from said plaintiff its costs of suit herein incurred in the sum of ($242.58). $113.65

DATED: July 22, 1952.

J. O. MONCUR
Judge of the Superior Court

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the State of California In Bank

Sac. 6526

ESPIMENIO MORENO,
Plaintiff and Appellant,
v.
Southern Pacific Company, a corporation,
Defendant and Respondent.

Filed April 29, 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

Plaintiff appeals from a judgment against him in an action brought under the Federal Employers' Liability Act to recover damages for injuries he sustained while working for defendant railroad company. The court, sitting without a jury, took evidence on the question of whether the federal act applied and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, but the court entered judgment notwithstanding the verdict on the ground that there was not sufficient evidence of negligence.

The first question presented is whether the Federal Employers' Liability Act is applicable. Plaintiff started working for defendant on October 3, 1951, and was injured on December 19, while laying rails in a retarder yard which defendant was constructing for the purpose of facilitating the movement of freight trains by means of a new method of "switching" and classifying railroad cars. The yard was to be used in connection with defendant's main line of track and was opened to interstate traffic four months after plaintiff's injury.

Federal coverage has been extended to an employee laying tile in a sewer which, when finished, was to be connected to a "roundhouse" where engines moving in interstate commerce were serviced. (Jordan v. Baltimore & Ohio R. Co. (W. Va.), 62 S.E. 2d 806.) The act has also been held applicable to an employee laying rails on a new section of roadbed which, upon completion, was to be used in connection with the main line of track carrying interstate commerce. (Agostino v. Pennsylvania R. Co., 50 F. Supp. 726.) The court in the Agostino case stated that "the construction work, while new, was only an improvement such as an extension, alteration, replacement or repair . . . ." (50 F. Supp. at 730.)

In the present case, the construction was new, but the yard was intended as a substitute for the existing method of switching and classifying railroad cars. The proper designation of the work, however, is not important since the applicability of the act depends on whether an employee's duties further interstate commerce or affect it "in any way directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. ....., 45 U.S.(A.) 51.) We are of the view that, under the circumstances involved here, plaintiff's duties furthered interstate commerce. He is,

therefore, considered to have been employed by defendant in that commerce and is entitled to the benefits of the act. (Gileo v. Southern Pacific Company, ante, p. .....)

The question remaining is whether there is substantial evidence supporting the implied finding of the jury that defendant was negligent. At the time of the accident, plaintiff was working as a member of a crew of three men. One of the men would operate a crane to lift a rail, and, while it was suspended horizontally, plaintiff and the other man would each take hold of one of its ends and guide it laterally until it was in the desired position over the roadbed on which it was to be laid. The crane operator would then be notified by signals to lower it. As plaintiff was guiding one end of a rail he slipped on a piece of metal and fell. The rail, which was suspended about three feet above the ground, dropped and struck his foot. No lowering signal had been given, and the rail came to rest 18 inches away from the point where it should have been laid. There is testimony that the crane operator could see plaintiff "at all times," and it may reasonably be inferred from the evidence that the rail which struck plaintiff was lowered prematurely due to the negligence of the crane operator.

The judgment is reversed with directions to enter judgment for plaintiff in accordance with the verdict.

GIBSON, C. J.

We concur:
SHENK, J.
EDMOND, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

Sac. No. 6520

EPIMENIO MORENO,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed, with directions to enter judgment for plaintiff in accordance with the verdict. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Aranda vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 87250

ROQUE ARANDA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

Order as to jurisdiction, opinion and judgment, trial court:

(Minute Order—Title of court and cause omitted)

Friday, February 15, 1952

Hon. John Quincy Brown, Judge
Superior Court Presiding

87250 Roque Aranda vs. Southern Pacific Company—
MEMORANDUM OPINION

This matter was previously ordered to be submitted and now on this day the court being fully advised in the premises ordered that the matter be submitted and ordered that the plaintiff has brought his case within the terms of the Act and that this court has jurisdiction for the purpose of trial. Let the necessary order be prepared in accordance herewith.

(Title of court and cause omitted.)

MEMORANDUM OPINION

This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury, pursuant to said stipulation. It was established that the plaintiff was a molder, molding and assisting in the molding or casting of freight car and other wheels for the use of the Southern Pacific Company. He has been such for about thirty years. The Southern Pacific Company maintains the Sacramento Wheel Foundry at Sacramento, and has maintained this foundry for many decades. The facts which have been established have been well stated by both parties in their briefs, and there is no conflict with regard thereto.

The production in the wheel foundry is controlled by the defendant's stores department. At the beginning of the year the stores department gives the wheel foundry a blanket order to produce wheels. These wheels are then produced. Some of them are to be used as soon as axles are added, and others are stockpiled to be sent out wherever needed on the entire Southern Pacific line. Many of these

wheels are immediately sent to Portland, Oregon, where the axle assembly is affixed, the wheel and axle unit returned to the Sacramento, California, repair shop, where they are fitted upon the trains as needed. It is admitted that these wheels will be affixed to hundreds of freight cars which are moving in interstate commerce. The company's experience has proven that the best and cheapest method of molding the new wheels is by the melting down of the old wheels and adding certain other alloys. When the wheels on the cars become too worn for continued use they are taken off and this process is adopted as herein set forth. There are no other provisions for the "repair" of such wheels. *This is the only way in which the cars change wheels.*

Since defendant's main argument is based upon a distinction made in many of the cases between "manufacture" and "repair", this basic fact must be definitely borne in mind.

The Federal Employers Liability Act as amended in 1939 (53 Stat., 1404) provides as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall for the purposes of this act be considered as being employed by such carrier in such commerce, and shall be considered as entitled to the benefits of this act."

Defendant in a very instructive and exhaustive brief has pointed out the history of the legislation, but this Court feels that the cases prior to 1939 have little bearing on the issue here. The defendant's argument is based upon the long line of cases which have drawn a distinction between "manufacture" and "commerce". This has been true for the reason that many interstate carriers carry on many other

activities. They might be engaged in running a local stage line, for instance, between, say, Sacramento and Stockton. If the activities were definitely only concerned with that particular line, this could be definitely said to be intrastate. Large corporations such as the Southern Pacific Company also may engage in extra-curricular activities as is pointed out by defendants, such as the maintenance of an office building. Those are clear cases. On the other hand if the plaintiff in this case had been definitely "repairing" a door, for instance, on the side of a freight car which had just come in from Portland, Oregon, and as soon as the "repairs" were done, the car moved on to El Paso, Texas, this would be a clear case of interstate commerce. This would be so even if it were a brand new door.

We are dealing here, however, with that vast group of fringe cases where the activities are in a twilight zone. The difficulty which Courts have had for many years is to place a label upon such activities. It is frequently impossible to definitely label an activity as inter- or intra-state commerce. For that reason there has been a trend towards liberalizing of the statutes in these matters.

How then, shall we construe the language of the section hereinabove set forth? If we use the word "furtherance of interstate commerce" or "directly or closely and substantially affecting such commerce", in a broader sense we practically obliterate intrastate commerce. If, on the other hand, we deal in such hair-splitting theories that "manufacturing" is a complete and separate and different business from that of "repairing" we will achieve just as absurd results in the other direction.

It is probably true that where a corporation is organized and does business strictly as a manufacturing concern such as the John Doe Car Wheel Company, which does nothing

but manufacture car wheels and sell them indiscriminately, that this probably would not be held to be interstate commerce. However, there is a phase that enters into the case at bar, and that is that all of these operations are merely departmental units of the defendant corporation, and are controlled entirely by the defendant. Had this plaintiff been working for an entirely independent corporation which had nothing to do with the parent company, then this probably could be urged, but here the whole matter is handled under one parental roof, and it seems to this Court that the Congress had just such a thing in mind when they admittedly liberalized the Act in 1939.

In vigorously putting forth the argument that the plaintiff in this case was engaged strictly in manufacture, the defendant places great reliance on the fact that many of the wheels are stockpiled for a period, and are not actually consigned to a specific freight car, and earmarked at the time they are made. Since this is so, defendant argues that the activities of the plaintiff here could not be under the catagory of "repairs" because he was not actually working upon a definite car at the time. This seems to this Court to be a hair-splitting theory. The whole chain of activity started with the taking off of the old car wheels, which are worn out, the transferring of those old car wheels into a vat where they are melted down, the pouring of this new melted material into new molds, the creation of the new car wheel, the affixing of the axles and the subsequent attaching of those axles and car wheels to freight cars in interstate commerce, seems to this Court to be one single operation.

The mere fact that the plaintiff is not personally present at the side of the freight car when the old wheel is taken off or the new wheel is put on seems to this Court to be immaterial.

It seems to be self-evident that No Wheel Can Be "Manufactured" Until Some Car Needs "Repair". This is absolutely true since the molten material cannot exist without the prior existence of the worn-out wheels. Without the first worn-out wheel there could be no creation of the new molten material. The mere fact that many of the wheels are stockpiled for a period does not seem to this Court to break the chain of causality between the creation of these new wheels and their running on the track, since it is the need for "repairs" which furnishes the material for the start of the so-called "manufacture". Thus if we must label this activity this Court would say that the process is both "manufacture" and "repair". The new wheels are in a sense "manufactured" and the cars are "repaired". It may be some time before a car which has lost its old wheels returns with its shiny new set on an interstate track, but it does not seem to this Court that time is of the essence here because the whole proceeding looks forward to and is indeed created for that purpose.

Thus it seems to this Court that even if we accept the yardstick pointed out by the defendant that unless the plaintiff can show that he was engaged in "repairing" rather than "manufacturing," he has shown that sufficiently for the purposes of the liberalized statute.

This Court sees no useful purpose in discussing all the cases which have been presented by the parties. The holding in one case frequently brings to mind a somewhat contrary holding in a very similar case. The law by its very nature, is not and can never be an exact science. Each case must be decided upon its own factual background. This Court is of the opinion that the plaintiff has brought his case within the terms of the Act and that this Court has jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 15th, 1952.

JOHN QUINCY BROWN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT ON VERDICT

THIS CAUSE came on regularly for trial N. S. Colley & M. Sakuma appearing as counsel for the plaintiff, and H. Wulff & V. Diepenbrock, of the firm of Devlin, Diepenbrock & Wulff for the defendant.

WHEREUPON, a jury of 12 persons was duly accepted, empaneled and sworn to try said cause. Witness of the part of the plaintiff and defendant were duly sworn and examined.

WHEREUPON, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

In the Superior Court of
The State of California
in and for
The County of Sacramento.

ROQUE ARANDA, Plaintiff — No. 87250

vs.

SOUTHERN PACIFIC COMPANY, Defendant — Dept. 2

VERDICT

WE the Jury in the above entitled action find for the Plaintiff and against the Defendant SOUTHERN PACIFIC COMPANY and assess Plaintiff's damages in the sum of $12,000.00, less the sum of $1448.57 heretofore paid by defendant to plaintiff. The net amount awarded is $10,551.43.

ALBERT G. PUIZ
Foreman

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that ROQUE ARANDA plaintiff do have and recover from SOUTHERN PACIFIC COMPANY defendant, the sum of Ten thousand five hundred fifty one and 43/100 Dollars ($10,-551.43) with interest thereon at the rate of seven per cent per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $120.80.

(File and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the
State of California
In Bank
Sac. 6521

ROQUE ARANDA,
Plaintiff and Respondent,
v.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Appellant.

Filed Apr 29 1955
William J. Sullivan, Clerk
By ..... Deputy

Plaintiff brought this action under the Federal Employers' Liability Act, seeking recovery for injuries sustained while working as a molder of freight car wheels in a foundry operated by defendant railroad company. He set forth three causes of action in his complaint, alleging that his injuries resulted, first, from negligent operation of a crane, second, from negligent maintenance of the crane, and, third, from failure to provide him with a safe place to work. The court, sitting without a jury, determined that the federal act was applicable, and the case then proceeded to trial before a jury on the other issues. A verdict was returned for plaintiff, and judgment was entered accordingly. Defendant appeals, contending that the federal act was not applicable and that there was not sufficient evidence to warrant submission to the jury of the issues raised by the third cause of action.

Applicability of the Federal Employers' Liability Act depends on whether plaintiff's duties were in the furtherance of interstate commerce or affected it "in any way

directly or closely and substantially." (Gileo v. Southern Pacific Company, ante, p. .....; 45 U.S.C.A. 51.) The freight car wheels which he molded were manufactured in accordance with annual orders from defendant's store department. Although the amount of production varied according to current demand, the wheels were not made for particular railroad cars and were taken, when completed, to defendant's storehouse. A few were sold to other companies, but almost all were sold to the Southern Pacific Equipment Company, a subsidiary of defendant, for construction of new cars or were used by defendant for maintenance purposes, including replacement of wheels on cars which defendant already operated in interstate commerce.

Federal coverage has been extended to employees injured while performing duties similar to those involved here. (Shelton v. Thomson, 148 F.2d 1 (operating a crane, located in a storehouse, to lift freight car wheels used to repair cars, including some which were operated in interstate commerce); Ericksen v. Southern Pacific Co., 39 Cal. 2d 374 (inspecting lumber for fitness as railroad ties, some of which would cross state lines and would be used to repair tracks carrying interstate traffic); Trucco v. Erie R. Co. (Pa.), 45 A. 2d 20 (constructing "strap hangers" used to replace parts of engines, some of which were devoted to interstate commerce).) In the present case, some of the wheels which plaintiff molded were to be used in repairing railroad cars moving in interstate commerce, and the importance of his work to that commerce was not reduced by the fact that the wheels were temporarily stored before being used. We are of the opinion that plaintiff's duties furthered interstate commerce. He is, therefore, considered to have been employed by defendant in interstate commerce

and is entitled to the benefits of the act." (Gileo v. Southern Pacific Company, ante, p. .....)

It is conceded that the evidence is sufficient to support the verdict based upon the first and second causes of action in which it was alleged that plaintiff's injuries resulted from the negligent operation of a crane and from the negligent maintenance of a crane. It is contended, however, that there was no evidence that defendant failed to provide plaintiff with a safe place to work, as alleged in the third cause of action and that the court erred in submitting this issue to the jury. Plaintiff worked near a large crane which stood in a circular area at the center of two concentric rings of wheel molds. Access to the crane through the double ring of molds was afforded by two openings, each 21 feet wide. The crane was equipped with a horizontal boom and with a cable which was attached to the end of the boom and was strung down through several pulleys to a hook. Molten metal was carried from a furnace to the 21-foot openings by means of a bucket-shaped ladle placed on a movable platform. When the molder and his helper were ready to fill the molds, the crane hook was fastened to the handle of the ladle, and the crane raised the ladle vertically and maintained it in a position several inches above the molds. The ladle, which was about two feet in diameter, was open at the top and was designed to drain from the bottom. The molder was required to be close to the ladle in order to adjust it over each mold and to fill the mold by opening the stopper at the bottom of the ladle.

At the time of the accident, plaintiff was standing between the inner and outer rings of molds and was preparing to open the stopper. The cable attached to the end of the boom slipped from three clamps which were holding it, and the ladle dropped against a mold, tipping and spilling the

contents of the ladle. Plaintiff, in attempting to escape from the molten metal, jumped over the inner ring of molds and landed in some of the spilled metal, suffering severe burns.

The degree of care required by the Federal Employers' Liability Act is that which a person of ordinary prudence would have exercised under the circumstances, and although there was no proof as to the practice in the industry with respect to the method commonly employed in the molding of wheels, evidence of custom is not indispensable. (Chicago, M. & St. P. Ry. Co. v. Moore, 166 F. 663, 668.) The fact that the metal was drained from the bottom of this container permitted an inference that, once the ladle was filled, a lid could have been placed on it without impeding the molding process. Pictures of the ladle and of the manner in which it was used were shown to the jury, and we cannot say as a matter of law that the jury could not properly conclude that it was feasible to equip the ladle with a lid which would have prevented the accident and that, in view of the hazard to workmen defendant should have provided such a lid. Accordingly, the issues raised by the third cause of action were properly submitted to the jury.

The judgment is affirmed.

GIBSON, C. J.

We concur:
SHENK, J.
EDMONDS, J.
CARTER, J.
TRAYNOR, J.
SCHAUER, J.

In the Supreme Court of the State of California

Sac. No. 6521

ROQUE ARANDA,
Plaintiff & Respondent,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Appellant.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby affirmed. Respondent to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Eufrazia vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 90452

ALBERT EUFRAZIA,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant.

Opinion, findings and judgment, trial court:

(Title of court and cause omitted.)

OPINION

The question presented to the Court is whether or not the plaintiff, who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for his alleged damages under the Federal Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that the provisions thereof have broadened the scope of those who may come within its terms; however, it has been definitely determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a different Board of Directors. It will be noted also that these gondolas are stenciled "T & NO", which stands for Texas and New Orleans R. R. Co., another subsidiary of the S. P. Co.

The financial company is The Pennsylvania Company for Banking and Trusts, Trustee. These matter are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R.R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the program of expansion. In this regard reference is made to the cases of Cleaning and Pressing Co. vs. Hollywood L. Service, 217 Cal. 124, 129; Erkenbrecher vs. Grant, 187 Cal. 7, 11.

Plaintiff had been assigned to work in car shop nine as a reamer on the ends of the gondola cars. He was injured while so working on July 10th, 1952, a period of a little less than a month after his assignment.

The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A. 2nd. 603.)

The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under a Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award, and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2d, 603)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of

the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vulnerable to attack from a constitutional standpoint as it was in its first enactment.*

There are really two aspects to this case: First: What was plaintiff doing at the time of the accident in his work, in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC.

If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even farther, and, for like reasons, come to the conclusion that those who drew the plans

for the construction of the gondolas would, in case of injury, be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding, as will appear hereafter.

Adverting now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon by plaintiff, clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P 2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act in 1939, we find the following:

> "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distinguished from repair or maintenance work, was generally held not to be engaged in interstate commerce with the purview of the federal act, the courts by no means agreed as to the tests by which to ascertain whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1941) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.

As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new appliances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.

The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though intended to be used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence which at that time are actually being used in interstate commerce. As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler (1925); (CCA 8th) 9 F (2d) 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47 S Ct 100); Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909; Lombardo v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho)

(reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 124 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in the new construction column, or in the repair and maintenance column. Each case must be decided upon its own facts. Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old

bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.' State v. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 P 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce, or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by replacing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency, therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' Lombardo v. Pittsburgh & L. E. R. Co. (1927) 91 Pa Super Ct 307."

Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign commerce. New con-

struction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only work plaintiff does can have no possible influence or effect on commerce. His work is finished before the gondolas are turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchman was injured.

If is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work in Car Shop 9: that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of the federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and The S. P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B) In defendant's Exhibit K, it refers to an order for 380 of the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of these gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Searborough vs. Penn. R. Co., supra, in his claim that even though he was not working in interstate commerce at the time of his injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: " . . . . If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefit of the act. The preponderance of service performed by railroad employees is interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no intimation is intended that it is only where there is a shifting of employees as stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: Dec. 31 1952

MALCOLM C. GLENN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

That the answer of the defendant filed in the above entitled matter pleads that the above entitled court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney THOMAS C. PERKINS, ESQ., and the defendant SOUTHERN PACIFIC COMPANY acting by its attorneys MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, the said special defense having been argued, briefed and submitted and after due consideration of the same, the Court now makes in writing the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I

That at all times mentioned in said complaint the defendant SOUTHERN PACIFIC COMPANY was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and doing business in the State of California; that said defendant was at all times mentioned in said complaint and now is engaged in several businesses, among which are and is a common carrier by railroad in both interstate and intrastate commerce and the assembling and/or manufacturing of new railroad freight cars as an independent contractor for the Southern Pacific Equipment Company.

II

That on the 10th day of July, 1951, and for some time prior thereto, the plaintiff was employed by the defendant as a mechanic in the assembling and manufacturing of such new railroad freight cars which the defendant had contracted to assemble and build as an independent contractor pursuant to the terms of a written contract with the Southern Pacific Equipment Company, and that at all times herein mentioned the plaintiff and the defendant were not engaged in the conduct of the latter's business of a common carrier by railroad, but at all of such times were engaged in its business of assembling and/or manufacturing new freight cars as hereinabove stated.

III

That at all times herein mentioned no part of plaintiff's duties as such mechanic directly, closely and/or substantially affected or was in furtherance of said interstate or foreign commerce (as a carrier by railroad engaging in commerce between some of the several states).

CONCLUSIONS OF LAW.

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I.

That the above entitled Court has no jurisdiction over the subject matter of the above entitled action and that plaintiff must seek his remedy pursuant to the provisions of the California Workmen's Compensation Act.

II

That the plaintiff take nothing by his said complaint and,

that defendant do have judgment against plaintiff above named and its costs of suit herein incurred.

/s/ MALCOLM C. GLENN
Judge of the Superior Court.

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT.

That the answer of the defendant filed in the above entitled matter pleads that the above entitled Court has no jurisdiction of the subject matter of any of the alleged causes of action set forth in the complaint of plaintiff, and pursuant to Section 597 of the Code of Civil Procedure, the above entitled Court, upon motion of the above named defendant, heretofore having duly and regularly proceeded to the trial of said special defense before trial of any other issue in the case, Honorable Malcolm C. Glenn presiding, a jury having been waived by the respective parties hereto, the plaintiff appearing by his attorney, THOMAS C. PERKINS, ESQ., and the defendant SOUTHERN PACIFIC COMPANY acting by its attorneys MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, the said special defense having been argued, briefed and submitted, and purusant to the order of the Court, Findings of Fact and Conclusions of Law have been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorney for plaintiff, and there being no amendments proposed within the time allowed by law, or at all; and the Court having heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directed that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED as follows, to-wit:

1. That the plaintiff take nothing by his said action and that said action be, and the same is, hereby dismissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of ($.....).

Dated: January 26, 1953.

/s/ MALCOLM C. GLENN
Judge of the Superior Court.

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the
State of California
In Bank

Sac. 6522

ALBERT EUFRAZIA,
Plaintiff and Appellant,
v.
SOUTHERN PACIFIC COMPANY,
a corporation,
Defendant and Respondent.

Filed April 29, 1955
William I. Sullivan, Clerk
By.....
S.F. Deputy

BY THE COURT

Plaintiff was injured while employed by defendant railroad company as an advanced carman helper in the construction of parts for new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing

on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

On June 13, 1951, plaintiff, who had worked for defendant during the previous nine months repairing railroad cars already in service, began assembling "ends" for new gondola cars and did this work exclusively until he was injured on July 10. When assembled, the "ends" were conveyed to a main assembly line in another part of the shop and were there attached to the cars. The construction project was the same as that involved in Gileo v. Southern Pacific Company, ante, p. ...., this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

In the Supreme Court of the State of California

Sac. No. 6522

ALBERT EUFRAZIA,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy

Eelk vs. Southern Pacific Company

Trial court and cause entitlement:

In the Superior Court of the State of California in and for the County of Sacramento

No. 87156

CHARLES EELK,
Plaintiff,
vs.
SOUTHERN PACIFIC CO., a corporation,
Defendant.

Opinion, findings and judgment, trial court:

(Title of court and cause omitted.)

MEMORANDUM OPINION

This is a suit brought by the plaintiff against the defendant company, his employer, for damages alleged to have been sustained by plaintiff due to negligence of the defendant. The matter was set for trial before this Court, but before proceeding with the jury trial, it was stipulated that the Court should first hear and determine the question of whether or not the Federal Employers' Liability Act was applicable. In other words, if this act is applicable, then the plaintiff may sue in the Superior Court. If, however, the Federal Act is not applicable, the plaintiff must be governed by the Workmen's Compensation Act and the matter heard before the Industrial Accident Commission of the State of California.

The Court heard evidence with regard to this issue, sitting without a jury pursuant to said stipulation. This point has been before this Court many times. In a case decided by the writer hereof, *Arranda vs. Southern Pacific Co.*, Sacramento County Superior Court No. 87250, wherein the Memorandum Opinion was filed on February 15, 1952, the writer held that the facts of that case showed that the plaintiff was engaged in repairing rather than manufacturing, as was contended by the defendant. Accordingly, this Court in that case held that the Superior Court had jurisdiction for the purposes of trial.

In most of the cases there is just a sufficient factual difference to place each case in an individual twilight zone.

However, a recent case in the Superior Court of Sacramento County, *Albert Eufrazia, plaintiff, vs. Southern Pacific Co., a corporation, Defendant*, No. 90452, an identical case factually with the case at bar, has just been decided by Honorable Malcolm C. Glenn, the Memorandum Opinion having been filed December 31, 1952. The facts in that case are identical with those in the instant matter. This Court has had ample opportunity to study the cases cited by both counsel in very exhaustive and informative briefs. It would serve no useful purpose here for this Court to write an opinion identical with that of Judge Glenn, and since this Court is in accord with Judge Glenn's Opinion, it will adopt that opinion for all purposes in regard to the instant case. That opinion, we quote as follows:

"The question presented to the Court is whether or not the plaintiff who was injured while working for the Southern Pacific Co. on ends to be placed on gondolas, is entitled to bring a suit for this alleged daniages under the Federal Employers' Liability Act, or whether his remedy is under the California Workmen's Compensation Act.

The question arises mainly by reason of the amendment of the Federal Employers' Liability Act passed in 1939. There is no question but that the provisions thereof have broadened the scope of those who may come within its terms; however, it has been definitely determined that not all employees working for a railroad and who are injured may claim the right to bring suit thereunder.

The facts are not in serious dispute. Therefore, it will not be necessary to make reference thereto to any great extent. The Southern Pacific Co. had entered upon a large expansion program, among which was the acquisition of one thousand gondola cars. These cars were being assembled or fabricated in Car Shop 9 of the S. P. Co. for the Southern Pacific Equipment Co. (hereafter referred to as the SPEC.)

In order to finance the plan of expansion, various contracts and obligations were necessary to be entered into.

The Southern Pacific Equipment Co. is a subsidiary of the S. P. Co. It is wholly owned by said Company, but with a different Board of Directors. It will be noted also that these gondolas are stencilled "T & NO", which stands for Texas and New Orleans R.R.Co., another subsidiary of the S. P. Co.

The financial company is the Pennsylvania Company for Banking and Trusts, Trustee. These matters are all set forth in defendant's Exhibit "F".

While the SPEC and T & NO R.R. Co. are subsidiaries of the S. P. Co., they are not, strictly speaking, the alter ego of the latter railroad company. There is no question but that the entire scheme for the S. P. Co. acquiring additional equipment was a legitimate project, and the various companies mentioned above were necessary, or at least desirable, in order to work out a plan of financing the

program of expansion. In this regard reference is made to the cases of Cleaning and Pressing Co. vs. Hollywood L. Service, 217 Cal. 124, 129, Erkenbrecher vs. Grant, 187 Cal. 7, 11.

Plaintiff had been assigned to work in Car shop nine as a reamer on the ends of the gondola cars. He was injured while so working on July 10th, 1952, a period of a little less than a month after his assignment.

The Federal Employers' Liability Act was amended in 1939, which greatly broadened the scope of those working for the various railroad companies who may bring suit under the provisions of said act.

The case is important to both sides. The question whether or not an employee of a railroad comes within its provisions is one of law; and this is true even though the facts may be in dispute. (Scarborough vs. Penn. Railroad, 32 A. 2d. 603.)

The question presented raises the jurisdictional point whether the federal act applies or the injured workman or his family, if he happened to be killed, shall make claim under the provisions of the Workmen's Compensation Act? According to the decided cases involving this question, there is no alternative, even though the employee or the employer or both wish to proceed under the one or the other. The facts determine the remedy. Therefore, it may be, as existed in one of the cases cited by plaintiff, the workman so injured had secured an award under the Workmen's Compensation Act, but the employer, railroad, attacked the jurisdiction of the board making the award, and the Federal Court reversed the award and held that the Federal Act applied. (Scarborough vs. Penn. Ry. Co., 35 A 2d, 603)

It will be noted that if it be ultimately held, as several of the cases cited by plaintiff hold, that all employees of rail-

roads engaged in interstate commerce come within the provision of the Federal Act, then the provisions of the Workmen's Compensation Act of this state becomes a dead letter so far as they are concerned. In other words, under such a theory, such employees who may be injured will be deprived of the benefits of the provisions of said Workmen's Compensation Act.

The statement of one or two courts to the effect that *all employees of such railroad* come within the provisions of the Federal Act was probably inadvertently made, or made without careful study of the act after amendment, *for the majority of the cases not only hold to the contrary, but such a determination would make the Federal Act as vulnerable to attack from a constitutional standpoint as it was in its first enactment.*

There are really two aspects to this case: First, What was plaintiff doing at the time of the accident in his work in Car Shop 9? Second: Was this a temporary employment, so that the Court may consider his job prior to such employment or assignment to Car Shop 9?

First: Plaintiff was working as a reamer on ends to be attached to the gondolas. The SPEC was employing the S. P. Co. to assemble the cars. It was entirely new construction. True these cars were eventually to become a part of its own system, but the method of financing the program of expansion was through two subsidiary corporations, and through a financing company. The S. P. Co. only acquired a lease to the gondolas, which would ripen into a title when the underlying certificates were paid to the financing company.

It is deemed unimportant so far as the matter of financing the program of extension is concerned, except so far as the facts show that the employees of Car Shop 9 were

engaged in new construction of assembling or fabricating material for the building of the gondola cars for SPEC.

If plaintiff is entitled to maintain a suit under the Federal Act for his injury, then it would seem to the Court, that we must hold that even the men who work on the material first delivered to Car Shop 9, before any fabrication was started, would be entitled to bring suit under such act, if injured. We might go even further, and, for like reasons, come to the conclusion that those who drew the plans for the construction of the gondolas would, in case of injury, be forced to bring suit therefor under the Federal Act. But it is the view of this Court that there can be no such holding, as will appear hereafter.

Adverting now to some of the principal cases after the amendment of the Act, while there still appears to be some uncertainty in the minds of some Courts under the facts in the individual case, there appears to be no dissent where there is new construction, particularly under facts somewhat parallel to those of the instant case, from the holding that the Federal Act does not apply.

Let us first take the Erickson case, (39 A C 385): That case, strongly relied upon by plaintiff clearly distinguishes between new construction and the facts of the case itself. In this regard it is stated: "(3) It has been held that work on new tracks not yet in service is not covered by the act." Citing Moser vs. Union Pac. R. Co., 65 Idaho 479; 147 P2d, 336, 153 ALR 341. With this statement the Court has in effect approved the holding in the case cited. Turning to the case cited, which contains a long and careful analysis of innumerable decisions both before and after the amendment of the Federal Act in 1939, we find the following:

> "While, at least prior to the 1939 amendment, a railroad employee engaged in new construction, as distin-

guished from repair or maintenance work, was generally held not to be engaged in interstate commerce with the purview of the federal act, the courts by no means agreed as to the tests by which to ascertain whether a certain activity constituted new construction or repair (maintenance) work. As stated in Gulf, M. & N. R. Co. v. Madden (1941) 190 Miss 374, 200 So 119, the difficulty consisted in applying the distinction between new construction and repair or maintenance work to a given state of facts.

As in other instances, such a distinction is easily drawn in clear-cut cases; where a new instrumentality is to be erected for future use in interstate commerce and the work is carried out far away from any instrumentality then in existence and used at that time for interstate commerce, as where the first railroad is constructed through a certain territory, the work is undoubtedly to be classified as new construction work. Conversely, where an instrumentality that, at the time of work, is being used in interstate commerce, is maintained in an effective condition by taking care of its existing parts and without adding new appliances, as where loose spikes in ties are tightened while the road is being used in interstate commerce, the work is as clearly to be classified as repair or maintenance work.

The difficulties arise from situations in the 'twilight zone,' in which the work is concerned at the same time with new appliances or structures which, though intended to be used in interstate commerce, have not yet been so used at the time of the accident, and also with instrumentalities then in existence which at that time are actually being used in interstate commerce. As to these situations the courts have recognized that it is sometimes difficult to draw the line of demarcation between construction work and repair or maintenance work. See, for instance, Oregon Short Line R. Co. v. Gubler, (1925); (CCA 8th) 9 F (2d) 494 (writ of certiorari denied in (1926) 273 US 709, 71 L ed 851, 47

S Ct 100); Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499; Boyer v. Pennsylvania R. Co. (1927) 91 Pa Super Ct 307.

Since it is impossible to reconcile the inconsistent classifications made by the courts in the doubtful situation just described, the courts have held that each case must be decided in the light of its own peculiar facts. Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404, 121 A 878; Moser v. Union P. R. Co. (Idaho) (reported herewith) ante, 341; Lewis v. Cleveland, C. C. & St. L. R. Co. (1926) 240 Ill App 332.

Stating that the line between new construction and repair or maintenance work is sometimes difficult to draw and is, in reality, one of degree rather than of real difference, the court in Wallace v. New York, N. H. & H. R. Co. (1923) 99 Conn 404; 121 A 878, said: 'No hard and fast rule can be devised by applying which we can automatically place a given case in the new construction column, or in the repair and maintenance column. Each case must be decided upon its own facts. Some will be so clear as to classify themselves, but the majority of the contested cases will range themselves not far from the border line between these two classes of cases.'

Attempts have also been made to describe in abstract language the line of demarcation. 'Whatever may be necessary to keep the subsisting railway, its structures and equipment, in a safe state for interstate traffic, or to maintain it in that state and improve the state, may be said to be an act of repair, which commonly embraces not only restoration but also renovation or renewal by any process of making good, strengthening, supplying, or mending. Century Dictionary, "repair"; Inglis v. Buttery (1878) LR 3 App Cas (Eng) 552, 565, 579—HL. In those instances where difficulty arises in determining whether labor or betterment upon an interstate line of railway is new construction work or

repair and maintenance, the trend of decisions indicates that the doubt should be resolved in favor of the latter conclusion.' Boyer v. Pennsylvania R. Co. (1932) 162 Md 328, 159 A 909. To the same effect is Ross v. Sheldon (1916) 176 Iowa 618, 154 NW 499.

'It is common knowledge that railroad bridges are repaired by replacement of parts thereof, and frequently by the erection of new bridges, and at the same time commerce is carried on thereover without interruption. The erection of new parts or of a new bridge, under these conditions, is clearly the repair of the old bridge, and the fact that the old bridge is being used while the repairs are being made does not take it out of the use of the railway company in its duty as a common carrier of interstate commerce.' State v. Bates & R. Constr. Co. (1916) 91 Wash 181, 157 p 482.

'A careful study of the authorities called to our attention has convinced us that the dividing line between the two classes of cases is whether the construction is an original construction never having been dedicated to interstate commerce, or whether it is the repair, rebuilding, replacement, or enlargement of an interstate instrumentality after it has been so characterized by use. The question is not whether the instrumentality, when repaired, reconstructed, or enlarged, is entirely made of new material or of a new design or of a larger size, but whether or not it is still the original instrumentality, repaired, reconstructed or enlarged, retaining the same location and existing for the same purpose. Repairs may be made by replacing an instrumentality in whole or in part so long as the purpose is to remedy a defect or supply an insufficiency. The object of enlarging the turntable was to supply a deficiency, therefore the rebuilding of it belongs to the operations designated as repairs when distinguished from original constructions.' Lombardo v. Pittsburgh & L.E.R. Co. (1927) 91 Pa Super Ct 307.".

Looking at the amendment to the act it will be noted that it contains these provisions: "Any employee of a carrier, any part of whose duties shall be furtherance of interstate commerce or foreign trade; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purpose of this chapter, be considered as being entitled to the benefits of this chapter." So far as the first clause is concerned, it would seem quite clear that making new equipment for another corporation, although employed by the S. P. Co., cannot be said to be duties in furtherance of interstate or foreign commerce. New construction has nothing to do with commerce. Does such work fall within the provisions of the second clause of the amendment? Does it in any way directly or closely and substantially affect such commerce?

Plaintiff was engaged in new construction work; the material was purchased by SPEC and delivered to the S. P. Co. by whom plaintiff was employed. Of course the fabrication of the gondolas, under such circumstances, had nothing to do with commerce, of any kind. Plaintiff's work was finished and completed when the gondolas were delivered or shipped by SPEC to its consignors.

Does the fact that new construction work such as involved herein, bring one who works thereon within the provisions of the Federal Act? The only argument which can be made in the affirmative is to claim that after the assembling or fabrication of the gondolas they were immediately placed on the S. P. Co. tracks for transportation to points outside of the State of California, and that the assembling of these parts with the immediate shipment by rail over the S. P. Co. lines does closely and substantially affect such commerce.

Thus, the activity of plaintiff must affect or produce some effect or influence on interstate commerce. The only

work plaintiff does can have no possible influence or effect on commerce. His work is finished before the gondolas are turned over to the SPEC for shipment. Where equipment, such as engines and other rolling stock is brought in for repair, the men who work thereon affect interstate commerce, because the work they are doing is in furtherance thereof and which affects the same; the same is true of switchmen because they are handling interstate commerce traffic, and under the 1939 amendment they need not be so handling the same at the moment of an accident whereby such switchman was injured.

It is true that the amendment must be given a liberal construction in favor of the employees, but this does not justify an interpretation which does violence to the apparent intent of the wording of the act itself.

Second: Plaintiff makes the claim that prior to his assignment to Car Shop 9, he was working in interstate commerce; that he was only temporarily assigned to the work in Car Shop 9; that he was liable to be called by the S. P. Co. at any time to do his work in which he formerly was engaged, and hence when he was injured he was still privileged to sue under the provisions of federal act.

The facts which were developed at the hearing showed that there was nothing said about whether the work in Car Shop 9 was to be merely temporary or more or less permanent. There was no testimony in the case, nor any intimation, that plaintiff was to be withdrawn from his employment of reaming ends of the gondolas. The expansion program required the construction of 1000 gondola cars, together with other cars which are not particularly involved in this proceeding. If we examine the photographs introduced in evidence as to the activities in Car Shop 9 in assembling these gondola cars, we note that it is a very

large and continuous project. When the work started on the assembling of these gondolas does not appear; but there is an agreement which is dated September 29th, 1950, between the SPEC and the S. P. Co. in regard to the construction of the program of expansion. (Deft. Exhibit B) In defendant's Exhibit K, it refers to an order for 380 of the gondola cars, which appears to be the first order made for the payment to be made thereon. From the surrounding circumstances it may be a long time before all of these gondola cars are completed. How long, whether months or several years, was not disclosed by the evidence, so far as the Court can recall.

Plaintiff relies upon the case of Scarborough vs. Penn. R. Co., supra, which held that even though he was not working in interstate commerce at the time of l... injury, he may still claim the privileges of the act, as above noted. The case is in no way parallel in its factual aspects with the case at bar. The injured employee was regularly employed as a signalman. For some weeks he had been employed in installing new station lights, and was so employed at the time of the accident. The Court points out that both employments came within the provisions of the Federal Employers' Liability Act. In the course of the opinion the Court states: " . . . . If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefit of the act. The preponderence of service performed by railroad employees is interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed." In quoting this portion of the amendment no

intimation is intended that it is only where there is a shifting of employees as stated which is covered by the amended act; but that is one provision which has been definitely settled in favor of the employee.

In view of the foregoing, it is concluded that plaintiff must seek his remedy within the provisions of the California Workmen's Compensation Act, and not under the Federal Employers' Liability Act.

Dated: December 31, 1952.

Malcolm C. Glenn
Judge of the Superior Court"

This Court wishes to again emphasize the point that if the FELA be so construed that the words, "shall in any way directly or closely and substantially affect such commerce . . ." shall mean that all employees of railroads engaged in interstate commerce come within the provisions of the Federal Act, then this would render nugatory the provision of the Workmen's Compensation Act of this state, and this Court would have grave doubts as to the constitutionality of the FELA if so interpreted.

It should be remarked that nearly all of these cases are in this twilight zone heretofore remarked by this Court. True, there may be great difficulties in determining where repair stops and manufacture begins, and true, there may be difficulties in determining where manufacture stops and some form of transit begins, but in this case it seems to this court that we have clearly a manufacturing case here. For the reasons above stated, and the reasoning adopted in the Eufrazia case, supra, this Court is of the opinion that the plaintiff has not brought his case within the terms of the Federal Act, and that the Superior Court has no jurisdiction for the purposes of trial.

Let the necessary order be prepared in accordance herewith.

Dated: February 9, 1953.

JOHN QUINCY BROWN
Judge of the Superior Court

(File endorsement omitted.)

(Title of court and cause omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, ANTHONY J. SCALORA, ESQ., and the defendant SOUTHERN PACIFIC COMPANY appearing by its attorneys, MESSRS. DUNNE, DUNNE & PHELPS and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

I

That at all times mentioned in the complaint, the defendant, SOUTHERN PACIFIC COMPANY, was and now is a corporation duly organized and existing under the laws of the State of Delaware, and doing business in the State of California; that at all times and places mentioned in said complaint, the defendant was engaged solely in the manufacturing of new railroad freight cars and was not engaging in transportation or in interstate or any commerce, as a railroad or as a common or any carrier, or otherwise.

II

That on the 22nd day of June, 1951, and at all times mentioned in said complaint, plaintiff was employed by defendant solely in the manufacturing of new railroad freight cars then and there being built by the Southern Pacific Equipment Company under a contract of sale to a third person; and that pursuant to the terms of a written contract between defendant and Southern Pacific Equipment Company, the defendant was to provide all necessary shop facilities and labor for the construction and manufacture of new railroad freight cars and upon the completion of the manufacture thereof, the same were to be delivered by said Southern Pacific Equipment Company to the third party purchaser.

III

That at all times mentioned in said complaint, no part of plaintiff's duties as an employee were the furtherance of interstate or foreign commerce or did in any way directly or closely and/or substantially affect such commerce.

CONCLUSIONS OF LAW.

As Conclusions of Law from the above and foregoing Facts, the Court holds as follows:

I

That the above entitled Court has no jurisdiction over the subject matter of the above entitled action and that plaintiff's sole remedy is under the provisions of the Workmen's Compensation Act of the State of California.

II

That plaintiff take nothing by his complaint and that defendant do have judgment against plaintiff and recover its costs of suit herein incurred.

Dated: March 10, 1953.

/s/ JOHN QUINCY BROWN
Judge of the Superior Court.

(File endorsement omitted.)

(Title of court and cause omitted.)

JUDGMENT

Defendant's answer to the complaint of plaintiff having set up the defense that at all times and places mentioned in the complaint the defendant was not engaged then and there as a common carrier by railroad in interstate or any commerce, and also the defense that at said time and place the plaintiff was not employed by the defendant in interstate or any commerce, and that the accident complained of did not arise while plaintiff and defendant were, or either of them was, engaged in the conduct of interstate or any commerce, and pursuant to Section 597 of the Code of Civil Procedure, and upon stipulation of the parties the Court having proceeded to the trial of this special issue or defense

before the trial of the merits of the plaintiff's alleged cause of action, Honorable John Quincy Brown presiding, a jury having been waived by the respective parties, and the plaintiff appearing personally and by his attorney, ANTHONY J. SCALORA, ESQ., and the defendant SOUTHERN PACIFIC COMPANY appearing by its attorneys, MESSRS. DUNNE, DUNNE & PHELPS and MESSRS. DEVLIN, DIEPENBROCK & WULFF, and evidence both oral and documentary having been adduced, and this special issue or defense having been argued, briefed and submitted, and pursuant to the order of the Court, Findings of Fact and Conclusions of Law having been heretofore prepared and proposed by the defendant, which said proposed findings were duly served upon the attorney for plaintiff, and there being no amendments proposed within the time allowed by law, or at all, and the Court having heretofore made and filed in writing its Findings of Fact and Conclusions of Law, and directing that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED as follows, to-wit:

1. That the plaintiff take nothing by his said action and that said action be, and the same is, hereby dismissed.

2. That the defendant do have and recover its costs of suit against said plaintiff, taxed in the sum of .....

Dated: March 10, 1953.

/s/ JOHN QUINCY BROWN
Judge of the Superior Court.

(Attestation, file and recording endorsements omitted.)

Opinion and judgment on appeal:

In the Supreme Court of the State of California

In Bank

Sac. 6523

CHARLES EELK,
Plaintiff and Appellant,
v.
SOUTHERN PACIFIC COMPANY, a corporation,
Defendant and Respondent.

Filed Apr 29 1955
William I. Sullivan, Clerk
By ..... S.F. Deputy

BY THE COURT

Plaintiff, who was employed by defendant railroad company as a carman helper, was injured while working on the construction of new railroad cars, and he brought this action under the Federal Employers' Liability Act. Before trial of the other issues, the court held a hearing on the question of whether the federal act was applicable and concluded that it was not. Judgment was entered accordingly, and plaintiff appeals.

Defendant first employed plaintiff on November 7, 1950, and assigned him to repairing railroad cars already in service. He was placed on construction of new railroad cars from December 1 until January 8, 1951, at which time, apparently due to a shortage of construction materials, he was reassigned to repairs. On February 13, he again started doing new construction work, and he was so engaged exclusively until June 22 when he was injured while riveting sides on a

new gondola car. The construction project was the same as that involved in Gileo v. Southern Pacific Company, ante, p. ....., this day decided, where a welder was injured while working on one of the gondola cars. The factual situations in the two cases are substantially similar, and our decision holding the act applicable to Gileo is controlling here.

The judgment is reversed.

In the Supreme Court of the State of California

Sac. No. 6523

CHARLES ELK,
Plaintiff & Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant & Respondent.

On appeal from the Superior Court in and for the County of Sacramento

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the JUDGMENT of the Superior Court in and for the County of Sacramento in the above entitled cause, be and the same is hereby reversed. Appellant to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of April, 1955, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 31st day of May, A.D. 1955.

WILLIAM I. SULLIVAN, Clerk By PAUL DINOIA, Deputy